No. 603

Supreme Court of the United States,

OCTOBER TERM, 1945.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,
STATE OF IOWA, *Intervenor*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

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February 6, 1946.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 34-42) is reported in 151 F. (2d) 20. The opinion and order of the Federal Power Commission (R. 8-14) are reported in 52 P. U. R. (NS) 82.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on August 13, 1945. The petition for writ of certiorari was filed on November 13, 1945, and was granted on January 2, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C. § 347) and Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. § 825 *l*).

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. § 791a) are set forth in the Appendix, infra.

QUESTIONS PRESENTED.

Upon consideration of an application filed on August 11, 1941, by petitioner for a license under Part I of the Federal Power Act to authorize the construction and operation of a power development on the Cedar River in Cedar and Muscatine Counties in the State of Iowa, and extending to the Mississippi River north of Muscatine, Iowa, the Federal Power Commission found that petitioner had not submitted satisfactory evidence of compliance with laws of the State of Iowa, as required by Section 9(b)[1] of the Federal Power Act, in that petitioner had not obtained a permit from from the State Executive Council authorizing the project. The questions presented are:

1. Whether a state permit is required for the construction of the proposed power project on the Cedar River in the State of Iowa, as provided in Chapter 363 of the Iowa Code of 1939, when, upon a declaration of intention filed pursuant to Section 23(b) of the Federal Power Act to construct the very project here in question, the Federal Power Commission in its Finding of June 3, 1941,[2] (a final determination from which no appeal was taken) found that the Cedar River, and the Iowa River into which the Cedar flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the construction of the proposed project; that lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."

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[1] Appendix, p. 6.

[2] Appendix, pp. 1-4 (2 F. P. C. 958).

2. Whether the Federal Power Commission erred in dismissing petitioner's application for a federal license upon the finding that petitioner "has not presented satisfactory evidence pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of *applicable* laws of the State of Iowa requiring a permit from the State Executive Counsel to effect the purposes of a license under the Federal Power Act, . . ."[3] (Italics supplied.)

3. Whether the Court below was in error in holding that Chapter 363 of the Iowa Code of 1939 has valid application in so far as navigable waters of the United States, within the State of Iowa, are concerned.

4. Whether the Court below was in error in holding that Congress in enacting Part I of the Federal Power Act did not completely occupy the field of regulation with respect to the construction, operation and maintenance of hydro-electric projects upon navigable waters of the United States.

5. Whether the Court below erred in holding that "The Commission, properly, insisted upon a good faith effort, by its applicant, [petitioner herein] to comply with the State law", and in failing to give effect to the opinion of the Attorney General of Iowa that the State Executive Council could not legally issue a permit to petitioner for the project involved (R. ~~19~~ 38).

6. Whether, with respect to navigable waters of the United States within the State of Iowa, Chapter 363 of the Iowa Code of 1939 was superseded by the Federal Water Power Act of 1920, as amended, which became Part I of the Federal Power Act of 1935 by Title II of the Public Utility Act of 1935 (49 Stat. 838).

7. Whether the Court below erred in holding that, with respect to the construction of power projects upon naviga-

[3] R. 18. (The word "Applicable" does not appear in Section 9 (b).)

ble waters of the United States requiring a federal license under Part I of the Federal Power Act, Section 9(b) of the Act, like Section 27, effectively *saved* certain State laws which otherwise would have been superseded.

8. Whether the Court below erred in holding that Section 9(b) of the Federal Power Act, "expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects", in view of the express provisions of Section 23(b) and the findings of the Federal Power Commission that a license, in accordance with the provisions of the Federal Power Act, was required for petitioner's project.[4]

9. Whether the Court below erred in holding that, with respect to the proposed project upon the Cedar River in the State of Iowa, a navigable river of the United States, petitioner's failure to comply with Section 7796 of the Iowa Code of 1939 which provides that whenever the erection of a dam affects highways, the applicant for a State permit to construct such dam, "shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways • • • ", constituted a failure to comply with Section 9(b) of the Federal Power Act and "For this reason alone, therefore, the Commission's order must stand." (R. 68).

10. Whether the Court below erred in holding "that the area of law covered" by Sections 7767 and 7771 of the Iowa Code of 1939, is "so obviously within the domain of the State's power that Congressional intention, to supersede the disputed state laws, must much more clearly appear than it does in the Power Act." (R. 69).

11. Whether the Court erred in holding that Chapter 363 of the Iowa Code of 1939 did not "stand as an obstacle to

[4] The Commission's findings are contained in its Order of June 3, 1941, Appendix, pp. 1-4 (2 F. P. C. 968).

the accomplishment and execution of the full purposes and objectives of Congress" as announced in Part I of the Federal Power Act. (R. 72.)

12. Whether Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code can be separated from context and given effect as separate provisions of law, in disregard of the fact that such sections are but coordinate parts of Chapter 363.

STATEMENT.

The Petitioner.

First Iowa Hydro-Electric Cooperative, the petitioner, is a non-profit cooperative association, organized under the laws of the State of Iowa and having its office and principal place of business in Muscatine, Iowa.

The Statute.

Under Section 4(e) of the Federal Power Act [16 U. S. C. 797(e)], the Commission is authorized to issue licenses to citizens of the United States or to any corporation organized under the laws of the United States, or of a state thereof, or to any State or municipality, for the purpose of constructing, operating and maintaining dams or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power derived from any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states.

Section 23(b) of the Act[5] makes it unlawful to construct, operate or maintain any dam, power house or other work incidental thereto across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States, except under and in accordance with a permit granted prior to June 10,

[5] Appendix, p. 7.

1920, or a license granted pursuant to the Federal Power Act.

The section further provides that any person intending to construct a dam or other project works across, along or in any stream *other than those defined as navigable waters of the United States* and over which Congress has jurisdiction under its authority to regulate commerce, shall before such construction file a declaration of such intention with the Federal Power Commission. Whereupon the Commission is required to cause immediate investigation of such proposed construction to be made and *if it shall find* that the interests of interstate or foreign commerce would be affected by such proposed construction such person shall not construct, maintain or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of the Federal Power Act. *If the Commission shall not so find*, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 9(b) provides that each applicant for a license under the Act shall submit to the Commission "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license under this Act."

The Proceeding Before the Commission.

On January 29, 1940, petitioner, as required by Section 23(b) of the Federal Power Act [16 U. S. C. 817], filed a declaration of intention with the Federal Power Commission for a run-of-river hydroelectric development to be located on the Cedar River, in Cedar and Muscatine Counties,

Iowa. Thereafter, on April 2, 1941, the original declaration of intention was supplemented to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa. On June 3, 1941, the Federal Power Commission found that the Cedar River, as well as the Iowa River into which the Cedar River flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the proposed construction; that public lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."

Thereafter, on August 11, 1941, petitioner filed an application with the Federal Power Commission for a license under Section 4(e) [16 U. S. C. 797(e)] authorizing the construction, operation and maintenance of the proposed power development.

The State of Iowa was permitted to intervene and, after extended hearings, the Commission on January 29, 1944, dismissed petitioner's application for a license upon the finding that:

> "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice." (R. 18)

On February 29, 1944, petitioner filed an application for rehearing pursuant to Section 313(a) of the Federal Power Act [16 U. S. C. 825 *l*(b)]. Thereafter, on March 7, 1944, the Commission entered an order denying the application for rehearing with the following finding:

> "The Commission *finds* that:
>
> "No useful purpose would be served by granting the petition for rehearing and that reconsideration of the

order of January 29, 1944, dismissing the application for license would not be appropriate." (R. 27.)

The Opinion Below.

On review, the Court below affirmed the Commission's order upon the ground, among others, that petitioner had not complied with the provisions of Section 9(b) of the Federal Power Act [16 U. S. C. 802(b)], by reason of its failure to obtain a permit from the Executive Council of the State of Iowa authorizing the construction, operation and maintenance of the hydroelectric development in question as provided by Chapter 363 of the Iowa Code; and that petitioner had otherwise failed to comply with Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court below erred:

1. In refusing to construe Section 9(b) of the Federal Power Act.
2. In failing to hold that Section 23(b) of the Federal Power Act represented a determination by Congress to maintain and exercise exclusive control and regulation over the construction of power projects upon navigable waters of the United States.
3. In failing to hold that petitioner had presented satisfactory evidence of compliance with the requirements of Section 9(b) of the Federal Power Act.
4. In failing to hold in so far as petitioner's proposed project is concerned, that Chapter 363 of the Iowa Code was superseded by the Federal Power Act when the Commission made its determination on June 3, 1941, that a license was required under the Federal Power Act.
5. In failing to hold that petitioner was under no obligation to comply with Chapter 363 of the Iowa code.

6. In failing to hold that petitioner was under no obligation to comply with individual sections of Chapter 363 of the Iowa Code.

7. In failing to hold that Section 9(b) did not save Chapter 363 of the Iowa Code.

8. In holding that petitioner failed to exhaust its administrative remedies.

9. In failing to reverse the decision of the Federal Power Commission.

SUMMARY OF ARGUMENT.

On June 3, 1941, the Federal Power Commission acting upon a declaration of intention filed by petitioner for authority to construct a power project upon the Cedar River in the State of Iowa, found that the Cedar River was a navigable water of the United States, that the proposed project would affect the interests of interstate and foreign commerce, that public lands of the United States would be flooded and occupied, and that a Federal license under the provisions of the Federal Power Act was required. Thereafter petitioner applied for a Federal license and the Commission, after extended hearings, dismissed petitioner's application upon the finding that it had not submitted satisfactory evidence of compliance with the requirements of the laws of the State of Iowa, in that it had not shown compliance with the requirements of Chapter 363 of the laws of that State, providing for a permit for the construction of power projects upon navigable waters within the borders of the State.

Congress in the Federal Power Act provided a comprehensive scheme for the regulation and development of water power projects. Section 23(b) of the Federal Power Act provides that a license from the Federal Power Commission is required for the construction of a power project upon navigable waters of the United States. Congress therein asserted exclusive power and authority over power

projects upon navigable waters of the United States, as well as power projects upon other waters where the interests of interstate or foreign commerce were affected.

All laws of the State of Iowa with respect to the construction of power projects upon waters flowing within its borders are embodied in Chapter 363 of the Iowa Code which is a comprehensive water power act. Section 23(b) of the Federal Power Act determines the permissive range within which power projects may be constructed pursuant to the provisions of Chapter 363. The legislative history of the Federal Power Act and of Section 9(b) of that Act shows that Congress did not intend that there should be any divided authority over the licensing of power projects (1) on navigable waters of the United States, or (2) where the interest of interstate or foreign commerce would be affected by such construction upon waters not defined as waters of the United States.

The Federal Power Commission and the Court below were in error in holding that petitioner's application for a license should be dismissed because of its failure to obtain a State permit under the provisions of Chapter 363 of the Iowa Code. If Section 9(b) can be construed to require a permit from the State of Iowa, as a condition precedent to the issuance of a license by the Federal Power Commission, petitioner is placed in an impossible position. If authorization is obtained from both State and Federal authorities, the question immediately arises as to which one of the two authorities is petitioner to obey. A license under the Federal Power Act and a permit under Chapter 363 of the Iowa Code would relate to the same subject matter in so far as construction, operation and maintenance of the project is concerned, the term of the permit or license, plans and specifications regarding construction and many similar phases relating to the regulation of a project constructed under permissive authority. The legislative history of Section 9(b) shows that it was not the intent of Congress that the consent of a State authority was to be required as a con-

dition to the grant of a license by the Federal Power Commission.

The decisions of this Court make it clear that the power and authority of Congress expressed in the Federal Power Act is exclusive. If Section 9(b) may be construed to require that a State permit is necessary, before petitioner can comply with the requirements of Section 9(b), then the State, by withholding such a permit or providing terms and conditions impossible of accomplishment, has veto power over the issuance of a license by the Federal Power Commission for the construction of a power project upon navigable waters of the United States.

There is no basis for the claim that Section 9(b) provides for the exercise of joint State and Federal control of power projects to be located upon navigable waters of the United States. Subsections 9(a) and 9(c) of the Federal Power Act are indicative of the true import of the entire section. The legislative history shows that the clear intent of Congress with respect to Section 9(b) was to require the type of information which would demonstrate to the Federal Power Commission that an applicant for a license was duly authorized to engage in business to effectuate the purposes of the license and that a water suppy for the power project was available at the point of proposed diversion. To construe Section 9(b) as the Federal Power Commission and the Court below propose would violate the very words of the section, the Federal Power Act as a whole, its purposes, and the intent of Congress. Under the construction of Section 9(b), proposed by the Court below, States and Territories instead of the Federal government would have jurisdiction over power projects upon navigable waters of the United States.

The Court below was clearly in error in holding that the Federal Power Commission properly required petitioner to make a good faith effort to comply with the provisions of Chapter 363 of the Iowa Code. At the same time the Court held that the State was not to be given a veto power over

the issuance of a license by the Federal Power Commission for the construction of a power project upon navigable waters of the United States. These alternate positions by the Court below seem to indicate that petitioner must undertake to comply with Chapter 363 of the Iowa Code and, if it fails by reason of the fact that the State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in the Federal Power Act, then petitioner is relieved from such compliance. The Court further avoids a construction of Section 9(b) by assuming that it must first construe the State law. Petitioner is seeking a construction of Section 9(b) and related sections of the Federal Power Act. Petitioner does not seek a construction of the State law. Petitioner is entitled to have the question as to the meaning of Section 9(b) and its true import answered by a Federal Court having jurisdiction. The main question is: Does Section 9(b) mean that petitioner must obtain a permit from the Executive Council of the State of Iowa before it is entitled to a license from the Federal Power Commission for the construction of a power project upon the Cedar River—a navigable water of the United States. Since the question is a Federal question to be considered and determined by a Federal Court, State laws are involved only to the extent necessary to arrive at a proper construction and interpretation of an Act of Congress.

ARGUMENT.

I.

A State Permit is Not Required for the Construction by Petitioner of the Proposed Power Project on the Cedar River in the State of Iowa as Provided in Chapter 363 of the Iowa Code of 1939 Since the Federal Power Commission in Its Determination Upon a Declaration of Intention Filed Pursuant to Section 23(b) of the Federal Power Act Found that a License for the Construction Proposed is Required Under the Provisions of the Federal Power Act.

A. Section 23(b) of the Federal Power Act provides the rule which determines whether a license from the Federal Power Commission is required for petitioner's proposed power project on the Cedar River in the State of Iowa, or whether such project may be constructed in such stream upon compliance with state laws.

Section 23(b) of the Federal Power Act is clear beyond question. A license from the Federal Power Commission is required for the construction, operation, or maintenance of a dam or other project works for electric power development "across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States * * *." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 399; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, certiorari denied, 315 U. S. 806; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, certiorari denied, 320 U. S. 792; *Wisconsin Public Service Corporation* v. *Federal Power Commission*, 147 F. 2d 743, certiorari denied, June 18, 1945. On the other hand, where doubt exists as to whether such a license is required, Section 23(b) is equally clear and specific as to the procedure required. It provides as follows:

> "Any person, association, corporation, State, or municipality intending to construct a dam or other project

> works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act."

Congress by these provisions provided an effective procedure to determine whether the proposed construction would affect the interests of interstate or foreign commerce. When the Commission finds that interstate or foreign commerce will be affected, although the proposed construction is not upon navigable waters of the United States, a license from the Federal Power Commission is nevertheless required.

Finally, Section 23(b) provides that a proposed power project may be constructed "upon compliance with State laws", only when the Federal Power Commission finds (1) that the proposed construction is not upon navigable waters of the United States; (2) that no public lands of the United States are involved; and (3) that the interests of interstate and foreign commerce will not be affected. The pertinent provisions of Section 23(b) in this regard are:

> "If the Commission shall not so find (that the waters of the stream in question are navigable waters of the United States; and that the interests of interstate and foreign commerce would be affected by the proposed construction) and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

In the case at bar, the Federal Power Commission, acting upon a declaration of intention filed by petitioner respecting the proposed project on the Cedar River, found that a license under the provisions of the Federal Power Act is required.

On January 29, 1940, petitioner filed a declaration of intention with the Federal Power Commission pursuant to the provisions of Section 23(b) of the Federal Power Act, for a run-of-river hydro-electric development on the Cedar River in the State of Iowa. This declaration of intention was supplemented on April 2, 1941, to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa. On June 3, 1941, the Federal Power Commission acted upon the declaration of intention, as supplemented, and found (1) that the Cedar River, and the Iowa River into which the Cedar flows, are navigable waters of the United States; (2) that the interests of interstate commerce will be affected by the proposed construction; (3) that public lands of the United States will be flooded and occupied; and (4) that a license under the provisions of the Federal Power Act is required for the proposed construction.

B. Chapter 363 of the Iowa Code is a comprehensive water power act of the State of Iowa and has no valid application where a license is required under Section 23(b) of the Federal Power Act.

All laws of the State of Iowa relating to obstructions, dams, mill races and water power improvements in streams of the State are contained in Chapter 363 of the Iowa Code of 1939.[6] It is a comprehensive water power act which has

[6] The Attorney General of Iowa at page 11 of Intervenor's Resistance to the Petition for writ of certiorari states: "It is true that the laws of Iowa relative to obstructions in streams, relative to mill races and to dams and to water power improvements, are all contained in Chapter 363 of the Code of Iowa."

The preamble to the Code Commission Bill (Senate File 186).

valid application only when a Federal license is not required under the provisions of Section 23(b) of the Federal Power Act. Specifically, a dam or other project works across, along, over, or in any stream or part thereof, *not a navigable water of the United States*, may be constructed in conformity with the provisions of Chapter 363 only when a declaration of intention, relating to the proposed project, has been filed with the Federal Power Commission and the Commission finds (1) that the interests of interstate or foreign commerce will not be affected by the proposed construction, and (2) that no public lands or reservations will be affected.

That Chapter 363 of the Iowa Code can have valid application only within the permissive range provided by Section 23(b) of the Federal Power Act, is made definite and certain by numerous court decisions. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 399; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, certiorari denied, 315 U. S. 806; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, certiorari denied, 320 U. S. 792; *Wisconsin Public Service Corporation* v. *Federal Power Commission*, 147 F. 2d 743, certiorari denied, June 18, 1945.

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which, with revisions, became Chapter 363 of the Iowa Code of 1924 and of 1939, provided:

> "The general purpose of this bill is to combine and codify into one body two chapters relating to water power improvement. Both these chapters ante-date hydroelectric development, and neither one is available for projecting and utilizing water power improvements in the modern sense. Recent investigations disclose that thousands of horsepower could be made available for industrial development under proper provisions of law. While the bill prescribes, with some modifications, the ancient mill dam and race statute, the two bodies of law are combined and broadened by the proposals of the bill in an effort to promote and encourage water power development."

Chapter 363 of the Iowa Code is printed in full in the Appendix hereto, pp. 9-17.

In *Wisconsin Public Service Corporation* v. *Federal Power Commission*, a license was required, under the provisions of the Federal Power Act, for the operation and maintenance of a dam in the Wisconsin River constructed under a license granted on February 26, 1887, by the Legislature of the State of Wisconsin. At pages 748 and 749 the Court said:

> "'Corporation [Wisconsin Public Service Corporation] makes the point that since authority to construct and maintain the dam had been granted by the State of Wisconsin, it constituted a permit for the reconstruction of the dam, and the Commission was without power to require the Corporation to take out a license under the Federal Power Act.
>
> * * * * *
>
> "But § 23(b) of the Act provides: 'It shall be unlawful for any person, State, or municipality, * * * to construct, operate, or maintain any dam * * * in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit * * * granted prior to June 10, 1920, or a license granted pursuant to this Act.'
>
> "The contention that the Act does not apply to dams constructed before the passage of the Federal Power Act was considered in Pennsylvania Water & Power Co. v. Federal Power Commission, 74 App. D. C. 351, 123 F. 2d 155, certiorari denied, 315 U. S. 806, 62 S. Ct. 640, 86 L. Ed. 1205. In that case, in disposing of the contention the court, 123 F. 2d at page 163, said:
>
> 'To sustain petitioner's position in this respect would be to disregard the plain language of the Act. Section 23 makes it unlawful "to construct, operate, or maintain * * *" a dam in a navigable water of the United States without a license. Petitioner is maintaining its dam contrary to this provision. It cannot be considered, we think, that Congress meant to allow existing obstructions to continue unregulated in the navigable streams of the United States.'

"Another case in which a similar contention was made is Niagara Falls Power Co. v. Federal Power Commission 2 Cir., 137 F. 2d 787, certiorari denied, 320 U. S. 815, 64 S. Ct. 206. In that case the company also sought to set aside an order of the Commission. It, too, contended that at the time it applied for its license, it had a permit which had been issued by the State of New York. The court rejected the contention and held that no prescription could run against the United States, and that *the State's license, being beyond its powers, did not give the company any right to seize upon the energy of the nation's streams, or to impair their navigability.*" (Italics added)

Thus, if a state license or permit is of no avail and a license is required from the Federal Power Commission for a project constructed upon navigable waters of the United States prior to the enactment of the Federal Water Power Act of 1920, there can be no valid claim that a *proposed project*, to be located upon navigable waters of the United States, may be lawfully constructed, operated or maintained, as of this date, under a state permit or license.

When Congress acts with respect to navigable waters of the United States, or respecting any waters, the obstruction of which affects interstate or foreign commerce, what it does is not open to question. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1. When Congress enacted the Federal Water Power Act of 1920, the limits of its control and regulation were made definitely clear and certain. When the provisions of Section 23(b) were expanded by Part II of the Holding Company Act of 1935, the intent of Congress was made equally clear and definite with respect to that enlarged area of control and regulation. Consequently, the Court below was obviously in error when it said:

"* * * considering only the two Sections upon which appellant and appellee have made the case to turn, Sections 7767 and 7771, we conclude that the area of law covered thereby is so obviously within the domain of the state's power that Congressional intention, to

supersede the disputed state laws, must much more clearly appear than it does in the Power Act." (R. 60)[7]

From and after the Commission's Finding of June 3, 1941, upon a declaration of intention filed pursuant to Section 23(b) of the Federal Power Act, that a license was required for petitioner's project, whatever authority existed in the State of Iowa to license or control power projects on the Cedar River in Iowa, a navigable water of the United States, was at an end. Chapter 363 of the Iowa Code was superseded and rendered inapplicable to power projects on the Cedar River. The purpose of Congress in enacting the Federal Water Power Act of 1920 was to unify control over hydroelectric power developments on navigable waters of the United States under a dominant federal authority.[8] It is true that the states and the federal government have legitimate functions within their own sovereignties and that because of our dual system of government, a contrariety of interests may at times arise. The possibility of a conflict of interests does not, however, justify the assertion by the Court below that "the Act contemplates a dual system of control and the exercise of appropriate powers

[7] Furthermore, the Court was in error in seeking to give effect to Sections 7767 and 7771 of Chapter 363 of the Iowa Code when those sections are but integral parts of the Chapter and have no individual standing. All sections of Chapter 363 are correlated with and tied to the permit requirements of Section 7771. Each Section, by its provisions, constitutes an obligation (1) which an applicant for a permit must satisfy, or (2) which a holder of a permit must observe. As a whole the various provisions make up the state water power act which is Chapter 363 of the Iowa Code.

[8] See Appendix, pp. 27, 43.
Representative LaFollette, a member of the Special Committee on Water Power, during the course of the debate on the bill on the floor of the House stated:

> "We are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development." 56 Cong. Rec. 9811.

by the State as well as by the Federal Government," if it is meant that Congress surrendered any part of its

[9] R. 57-58; see also to the same effect the Court's statements at R. 62, 65. 52, 53.

The Court below cites the following cases in its footnote 9 (R. 58): United States v. Appalachian Electric Power Co., 311 U. S. 377, 428-429; Alabama Power Co. v. Federal Power Commission, 75 U. S. App. 315, 320, 128 F. (2d) 280, 285; Safe Harbor Water Power Corporation v. Federal Power Commission, 3 Cir., 124 F. (2d) 800, 806-807. These cases provide no support for the claim that Congress delegated to the States, a part of its authority over navigable waters. Congress in Part I of the Federal Power Act sought to respect the rightful prerogatives of the States. It did no more. The legislative history of Section 9(b) of the Federal Water Power Act of 1920 makes that certain.

In its footnote 33 (R. 58), the Court below refers to *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61, 76, in support of the statement that the legislative history of the Federal Power Act indicated a purpose on the part of Congress to assist and strengthen State control and regulation rather than impair and diminish it. The *Jersey Central case* dealt with Parts II and III of the Federal Power Act enacted in 1935, more than 15 years after the enactment of Section 9(b) which was a part of the Federal Water Power Act of 1920, now Part I of the Federal Power Act. Likewise Parts II and III of the Federal Power Act were involved in *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U. S. 515, (Footnote 31 to Opinion below). (R. 62)

Reference to the case of *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 610 (Footnote 32) (R. 63), by the Court below provides no support for the reasoning of the Court. That case dealt with the Natural Gas Act of 1938. (c. 56, 52 Stat. 821; 15 U. S. C. 717 *et seq.*) Its provisions deal with the same matters of regulation concerning gas as Parts II and III of the Federal Power Act provides for electric power.

In its footnote 10 (R. 58), the Court below cites the following sections of the Federal Power Act; Section 4(e), 4(f), 7(a), 10(e), 14, 19, 20, 27, 16 U. S. C. A. §§ 797(e), 797(f), 800(a), 803(e), 807, 812, 813, 821. Nowhere in these sections is there the slightest indication that Congress intended or contemplated dual or divided control with respect to the exercise by it of its absolute power and authority over navigation and dominion over navigable waters. As to these, and the equally absolute right to issue licenses for the construction of power projects in such waters, Congress did not yield any part of its constitutional power or authority asserted in the Act. And it should be noted that the States themselves are as subject to the Power Act as any individual.

absolute jurisdiction over navigable waters of the United States. Section 23(b) clearly delineates the respective spheres of jurisdiction and control *in so far as licensing of power projects is concerned.* In this connection the meaning and effect of Sections 27 and 9(b) of the Federal Power Act is discussed in Part III of the argument *infra.*

II.

A Permit from the Executive Council of the State of Iowa, as Provided by Chapter 363 of the Iowa Code, Cannot be Required Under Section 9(b) of the Federal Power Act Since Congress by That Act Assumed Complete Dominion and Control Over Power Projects Located in Navigable Waters of the United States.

The Federal Power Commission, in dismissing petitioner's application for a license to construct a hydroelectric project upon the Cedar River in the State of Iowa, based its order of dismissal upon the following finding:

> "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice." (R. 14).

The Court below in sustaining the action of the Commission said:

> "In any event, as the Power Act places upon petitioner the affirmative duty of showing compliance with state laws, it must assume their constitutionality, make its application for a permit and pursue such remedies as may be available in the state, to establish its right to issuance of the permit. Until it has done so, it is in no position to challenge an order of the Commission, which is based upon its failure to do so." (R. 48).

If, for the sake of argument, it is assumed that petitioner can and does obtain a permit under Chapter 363 of the Iowa Code, and as a consequence, a license is issued by the Federal Power Commission, which authority must petitioner thereafter obey? A state permit under Chapter 363 of the Iowa Code entails substantial obligations which petitioner must assume when it accepts the permit. Likewise a license from the Federal Power Commission imposes heavy burdens upon a licensee. The provisions of the Iowa Code and the requirements of the Federal Power Act deal in large part with the same subject matter, i.e., (1) construction, operation and maintenance of project works, (2) approval of plans and specifications, or changes therein, (3) the license period, (4) annual fees and charges, and (5) revocation of the license or permit. Truly the Federal Power Commission and the Court below ask petitioner to undertake the impossible. Petitioner cannot serve two masters. As Mr. Justice McLean said in writing the Court's decision in *The Passenger Cases*, 7 How. 283, at page 399:

> "A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impractical in action. It involves a moral and physical impossibility."

When Section 9(b) was under consideration before the Power Committee of the House, an amendment was proposed which would have required that an applicant for a license submit satisfactory evidence that it has "*obtained the consent of the duly constituted authorities of the State or States within which the proposed project is to be located* • • • •" (Italics added.)

The amendment was rejected. During debate on the proposed amendment, Congressman Raker, in opposing the amendment, said:

> "Fundamentally, it [the amendment proposed] resolves itself into this, that the States might pass laws subsequent to the enactment of this legislation, and if this bill provided or required that the applicants should comply with the State laws, or rules and regulations

provided thereunder before he could operate under this bill, the whole scheme would be subject to the regulation and control, in effect, of the State, would it not?

* * * * *

"That really gets back to the fact that before he can proceed to obtain the benefits of this bill, which relates to the property of the Government, he must have complied with any and all laws, rules, and regulations provided by the State through its commission and other public functionaries, and therefore before the Government of the United States can grant him a license or a commission representing the Government of the United States, he must deal with another party first.

* * * * *

"That is what I am trying to get at. Congress having that power, [absolute power over navigable waters] should it waive it and make it possible by legislation that before any of this can be done, or before the licensee can get his license or the Commission have the power to issue it, he must have complied with any and all regulations provided by the State?

* * * * *

"Had we not better hold to what we have and not try to waive a fundamental right that is so necessary both on the public lands on the non-navigable streams as well as on the navigable streams?

* * * * *

"You might find this case: A party or association might have complied with all the provisions of the law save the one you referred to in your amendment. The commission would be justified in their view to give him a license, but he cannot comply with the State requirements and therefore because he is unable to comply with the State regulations, of necessity the commission cannot give him the license, and therefore you would, by your amendment, subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind."[10]

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[10] Hearings before the Committee on Water Power, House of Rep., 65th Cong., 2d Sess., 1918, pp. 368-370. (Appendix hereto, pp. 22-24)

Petitioner is in the position described by Congressman Raker. The Federal Power Commission is ready to issue a license[11] but the requirement that Petitioner first secure a state permit subordinates the right of the federal government to the right of the State. The Federal Power Commission and the Court below seek to impose a condition which Section 9(b) does not justify.

It would seem that this Court made it clear in *United States* v. *Appalachian Power Company*, 311 U. S. 377, that the power and authority of Congress to license hydroelectric projects in navigable waters of the United States, as exercised through the provisions of the Federal Power Act, is absolute and exclusive.

In that case a dam was under construction upon the New River in the State of Virginia under a license from the State. The United States filed a bill in the United States District Court for an injunction against the construction or maintenance of the proposed dam, otherwise than under a license from the Federal Power Commission or, in the alternative, a mandatory order of removal. In reversing the District Court and the United States Court of Appeals for the Fourth Circuit, which denied the relief sought, the Supreme Court said at page 424:

> "The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation

[11] The Commission in the course of its opinion dismissing petitioner's application said:

> "The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable." (R. 15)

is entirely within the Government's discretion. [United States v. Chandler-Dunbar Co., 229 U. S. 53, 66, 69, 76; cf. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 330.]

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. [Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 268; United States v. Rio Grande Irrigation Co., 174 U. S. 690, 707.] *This power is exercised through § 9 of the Rivers and Harbors Act of 1899 prohibiting construction without congressional consent and through § 4 (e) of the present Power Act.*" (Italics supplied.)

This Court has repeatedly recognized the power and authority of Congress to exercise plenary and exclusive control over obstructions and improvements in navigable waters of the United States. Thus, in *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, the United States brought suit for an injunction to enjoin the defendant from further continuing a boom which it had constructed across the Nooksack River in the State of Washington. The boom was constructed prior to the enactment by Congress of the Rivers and Harbors Act of September 19, 1890 (26 Stat. 454, c. 907). Section 10 of that Act prohibited the creation, or continued maintenance, of any obstruction to the navigable capacity of any waters of which the United States had jurisdiction, "not affirmatively authorized by law." The Court found that Nooksack River was a navigable water of the United States and held that if the boom had been constructed in conformity with the requirements of state law, prior to the Rivers and Harbors Act of 1890, it was a *lawful structure*, since Congress prior to September 19, 1890 and at the time when the boom was constructed had not by any legislation asserted its authority over or taken into its own jurisdiction the subject of obstructions to the naviga-

tion of this river.[12] However, the Court makes it clear that the authority of a state over existing structures, or over proposed structures, in navigable waters of the United States, is at an end when Congress acts. At page 215-216 the Court said:

> "The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, cannot be questioned. When Congress chooses to act, it is not concluded by anything that the states or that individuals by their authority or acquiescence have done, from assuming entire control of the matter, and abating any obstructions that may have been made, and preventing any others from being made except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is undoubted. This has been decided in numerous cases, and in the case of *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811, many of them are referred to by Mr. Justice Bradley in delivering the opinion of the court. If, however, in exercising its right in regard to the regulation and control of commerce, private property must be taken, the government is obliged to make compensation to the owner. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622."

But the Attorney General of the State of Iowa in the "Motion of State of Iowa for Leave to Intervene" in the Court below said:

> "By reason of said provisions of law (Chapter 363, Iowa Code) and the diversion of water involved in the

[12] The Court said at page 215, "When Congress in 1890 passed the river and harbor bill we think the expression contained in § 10 in regard to obstruction 'not affirmatively authorized by law' meant, not only a law of Congress, but a law of the state in which the river was situated, which had been passed before Congress had itself legislated upon the subject." The corresponding section (§ 10) of the Rivers and Harbors Act of 1899 contains the words "not affirmatively authorized by Congress". Act of March 3, 1899, c. 425, § 10, 30 Stat. 1151, 16 U. S. C. § 403; cf. 16 U. S. C. A. § 403.

proposed project of petitioner, the executive council of the State of Iowa could not lawfully grant a permit for the erection of the dam proposed." (R. 40)

If Section 9(b) be construed to require that petitioner must secure a state permit from the Executive Council, as provided by Chapter 363 of the Iowa Code, in order to satisfy the requirements of Section 9(b) of the Federal Power Act, then the State of Iowa has an effective veto power over every license which the Federal Power Commission might otherwise issue—in direct contravention of the Federal Power Act itself and the avowed purpose and intent of Congress.

III.

Section 9(b) of the Federal Power Act Provides No Basis for the Claim That the States and the Federal Government are to Jointly Participate in the Issuance of Licenses for Power Projects Upon Navigable Waters of the United States.

The Court below was in error in holding, with respect to Section 9(b) of the Federal Power Act that "This section is the one which expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects." (R. 65) The Court below, likewise, erred in holding that:

> "In enacting the Federal Power Act, it was not the intention of Congress that the Federal government should occupy the field completely, or that the states should be excluded. On the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the State, as well as by the Federal government. This is the plain purpose of Section 9(b). It is revealed, also, by other sections of the Act."[13]

[13] See footnote 9, *ante*, wherein other sections of the Act are considered.

Section 23(b) delineates the circumstances and conditions under which a power project may be built "upon compliance with State laws" and when a license from the Federal Power Commission is required. There is no mention of any joint authority. There is none. Section 9(b) has no force or effect until application is made to the Federal Power Commission for a license. That section specifies certain conditions which must be met before a license may issue. It does not limit or modify Section 23(b) which clearly defines the separate areas of dominion and regulation, state and federal. The very words of Section 9(b) preclude an interpretation that the section was designed to provide joint state and federal action in any respect whatsoever.

The genesis of Section 9(b) is indicated by a consideration of the other subdivisions of Section 9 and by reference to the legislative history of the Section.[14] 9(a) refers to maps, plans, specifications and estimates of cost which may be required by the Commission. 9(c) requires that each applicant for a license submit such additional information as the Commission may require. Sections 9(a) and 9(c) are obviously designed to provide full information and data regarding a proposed project so that the Federal Power Commission will be fully advised regarding all aspects of the contemplated undertaking. Sub-section 9(b) is of like tenor.[15] To the extent that the laws of the state or states, in which the project is to be located, require affirmative

[14] See Appendix, pp. 39-43.

[15] Congressman Mondell emphasized that Section 9(b) was designed to provide information to the Federal Water Power Commission. In the course of his discussion regarding this section, he said:

> "There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion." (Appendix, p. 42)

action to secure or preempt rights required for the operation of a power project, an applicant must show that all such requirements have been met. It is principally in the western states that laws have been enacted dealing with "the appropriation, diversion and use of water" for beneficial purposes. In such states, water for the irrigation of arid lands, for mining and for power purposes, is of vital public interest. No appropriation of water can ripen into a vested water right until the procedure prescribed by state law has been satisfied and the water actually devoted to beneficial use.

The laws of some of these states go so far as to require that a stream be marked by appropriate notice in writing at the point where water is to be diverted; that within a specified time thereafter such notice be recorded among the land records of the county wherein the notice is posted; and, that construction of the works and improvements, required to reduce the proposed appropriation of water to beneficial purposes, be prosecuted diligently. Thus, in *Imperial Water Co. No. 5* v. *Holabird*, 197 Fed. 4, the United States Circuit Court of Appeals for the Ninth Circuit said at page 12:

> "Section 1415 [Civil Code of California] provides the method by which the water of a flowing stream may be appropriated. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein: That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; the purpose for which he claims it; the place of intended use; the means by which he intends to divert it; and the size of the flume, ditch, pipe or aqueduct in which he intends to divert it. It is provided further that a copy of the notice must, within 10 days after it is posted, be recorded in the office of the recorder of the county in which it is posted.
>
> "Section 1416 requires diligence in the appropriation of water and provides that:

'Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water or the survey road or trail-building necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion.'

"Section 1417 provides that 'by completion' is meant conducting the water to the place of intended use."

Like provisions are to be found in the laws of the State of Oregon. In *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.*, 204 Fed. 516, various provisions of the Oregon law [Lord's Oregon Laws §§ 6525 et seq.] are set forth as follows:

"Section 4 of the act provides:

"When a point of diversion shall have been selected, such corporation shall post in a conspicuous place thereat a notice in writing containing a statement of the name of the ditch or canal or flume and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume, in width and depth, the number of cubic inches of water by miner's measurement under a six-inch pressure intended to be appropriated, and the number of reservoirs, if any." (p. 532.)

"Section 5 of the act of 1891 required further that:

"Within ten days from the date of the posting of such notice [notice required by section 4] such corporation shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume, distributing ditches, reservoirs and feeders, are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume. * * * *" (p. 533.)

"Section 7 of that act (Section 6595, Lord's Oregon Laws) provides:

"Where appropriations of water heretofore attempted have been undertaken in good faith, and the

> work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof." (p. 523.)

Satisfactory evidence of compliance with such requirements of state laws can be supplied to the Commission. Likewise, satisfactory evidence can be submitted to show that necessary authority has been obtained to engage in the business of generating, transmitting and distributing power as well as to engage in any other business necessary to effect the purposes of a license under the Federal Power Act.

Section 27 of the Federal Power Act provides:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses or any vested right acquired therein."

The principal public land bills of the United States are the Act of 1866,[16] the Act of 1877,[17] and the Act of 1902.[18] All of these laws contained a section similar to Section 27 of the present Federal Power Act. The state laws referred to therein are laws governing property rights; having particular application to the laws of the public land states in which the law of prior appropriation obtains.[19] These laws and rights acquired under them *are saved by Section 27* of the Federal Power Act from supersedure and from a future

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[16] Act of July 26, 1866, c. 262, 14 Stat. 253, 43 U. S. C. § 932.

[17] Desert Land Act of 1877, c. 107, 19 Stat. 377, 43 U. S. C. § 321.

[18] Act of June 17, 1902, c. 1093, § 8, 32 Stat. 390, 43 U. S. C. § 383.

[19] See Appendix, pp. 43-45.

taking of vested property rights *without compensation.*[20] They are not saved from the exercise by the United States, under the provisions of the Federal Power Act, of its absolute dominion over navigable waters of the United States. Section 9(b), on the other hand, requires satisfactory evidence by an applicant for a federal license of compliance with the requirements of state laws respecting bed and banks of streams and the appropriation, diversion, and use of water for power purposes, *prior* to the issuance of a license from the Federal Power Commission. No laws of a state, or vested property rights under such laws, are saved by virtue of Section 9(b). The section merely requires that an applicant for a federal license must show evidence of the acquisition by it of necessary rights required under state laws with respect to beds and banks and the appropriation, diversion and use of water for power purposes before the Federal Power Commission may issue a license for a power project.

Representative LaFollette, a member of the Special Committee on Water Power which reported the bill which became the Federal Water Power Act of 1920, stated in a speech in the House of Representatives:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely *insisting the State's rules of property as to water, bed, and banks must have been fully complied with or the license cannot issue.*"[21]

During the debate on the bill, Representative LaFollette further stated:

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[20] Henry Ford and Son, Inc. v. Little Falls Fibre Co. et al., 280 U. S. 369; United States v. Central Stockholder's Corporation of Vallejo, et al., 52 F. 2d 322.

[21] Appendix, p. 27.

"In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, [the Cress Case] as to the property rights of the States *as to the bed and banks and to the diversion of the water*, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get developments. We are earnestly trying not to infringe the rights of the States. If possible we want a bill that cannot be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States."[22]

The wording of Section 9(b), the legislative history thereof, and a consideration of the absolute power of Congress over navigable waters of the United States under the Constitution as asserted in the acts of 1890,[23] 1899,[24] and 1920[25] and 1935,[26] demonstrate beyond question that Congress did not, and never intended to, share *with the States* its dominion over navigable waters of the United States or surrender any part of its constitutional authority to provide the absolute rule by which such waters are to be regulated and dams and obstructions therein controlled.

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[22] Appendix, pp. 28-29.

[23] Rivers and Harbors Act of 1890, c. 907, 26 Stat. 454.

[24] Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1151, 33 U. S. C. §§ 401-403. See footnote 12, *ante*.

[25] Federal Water Power Act of 1920, c. 285, 41 Stat. 1063, 16 U. S. C. § 791.

[26] Federal Power Act, Act of June 10, 1920, c. 285, 41 Stat. 1063, 16 U. S. C. § 791, as amended by Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. § 791a.

The clear statement of Congressman Mondell when the bill, which became the Federal Water Power Act of 1920, was under consideration on the floor of the House, recounts the purpose and meaning of Section 9(b), and verifies our conclusions as to the intent of this section. In the course of his remarks, he said:

> "Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. [Section 9(b).] The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the commission very great harm would come if the amendment the gentleman proposes should be adopted. *There are two controlling reasons for the insertion of this paragraph. The first*, from the standpoint of water-power legislation, *is that the water-power commission shall have the benefit of all of the information which the States posses relative to the condition of water supply at the point of proposed diversion.* That is a very important reason for a provision of this kind. * * * * *The second reason is so that*

the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not." (Italics supplied.)[27]

To construe Section 9(b), as the Federal Power Commission and the Court below would have it construed, violates not only the words of the individual section but the Act as a whole, its purpose and the intent of Congress.

Diligent search fails to disclose any state law relating to the bed and banks of streams, where affirmative action is required prior to a taking for a power project or other public improvement, or that ultimately more is required than to compensate the owner for what is taken. This may well be since the words *bed and banks* were inserted in Section 9(b), at the instance of Representative LaFollette, while the bill which became the Federal Water Power Act of 1920 was under consideration on the floor of the House.[28] Representative LaFollette gave as his reason for inserting the words "bed and banks" the fact that the Supreme Court of the United States, in numerous decisions recognized certain rights of the states to water flowing within their borders as well as property rights to the bed and banks of such streams. He made reference to a decision by Mr. Justice Pitney on May 12, 1917, and quoted the following from that decision:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks."

The language quoted is found in *United States* v. *Cress*, 243 U. S. 316, 319, and a consideration of the entire statement by Mr. Justice Pitney, of which that quoted above is

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[27] Cong. Rec. Vol. 56, Part 10, p. 9813, 65th Cong. 2d Sess. 1918.

[28] See Legislative history, Appendix hereto p. 28.

a part, clarifies in large part the meaning of the words "bed and banks" as they appear in Section 9(b).[29]

The import of the *Cress case* was that property rights must be respected, even by the United States, or just compensation paid for the property taken as guaranteed by the Fifth Amendment. Representative LaFollette made it plain that he was primarily concerned with *property rights*.

Thus, Section 9(b) merely requires that an applicant for a license show that it has taken all steps required by state law to establish its right to do the things which it proposes to do. There must be compliance with such laws whether evidence of compliance is submitted to the Commission or not.[30]

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[29] The full statement to which reference was made is as follows:

"The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228; *Packer v. Bird*, 137 U. S. 661, 671, 34 L. ed. 819, 821, 11 Sup. Ct. Rep. 210; *Hardin* v. *Jordan*, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58, 38 L. ed. 331, 346, 352, 14 Sup. Ct. Rep. 548; *St. Anthony Falls Water Power Co.* v. *Wster Comrs.*, 168 U. S. 349, 358, 42 L. ed. 497, 501, 18 Sup. Ct. Rep. 157), subject however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations (*Shively* v. *Bowlby*, 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548; *Gibson* v. *United States*, 166 U. S. 269, 272, 41 L. ed. 996, 1000, 17 Sup. Ct. Rep. 578; *Scott v. Lattig*, 227 U. S. 229, 243, 57 L. ed. 490, 496, 44 L. R. A. (N. S.) 107, 33 Sup. Ct. Rep. 242), the exercise of this authority being subject, in its turn, to the inhibition of the 5th Amendment against the taking of private property for public use without just compensation (*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States* v. *Lynah*, 188 U. S. 445, 465, 471, 47 L. ed. 539, 546, 549, 23 Sup. Ct. Rep. 349."

[30] The Court below entirely misconceived the intent and purpose of 9(b) when it said: "We cannot agree with the Commission's conclusion as to the effect of Section 9(b). This Section is the one which expresses the major intention of Congress that the

Section 27 is of an entirely different nature. It does save the State laws therein enumerated. Vested water and property rights under such laws must be respected and preserved or, if taken, compensation paid.

In this connection the decision of this Court in the case of *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co., et al.*, 280 U. S. 369, shows the proper effect to be given to Section 27 of the Federal Power Act. In that case, Ford held a license from the Federal Power Commission permitting the installation of flash boards on a Government navigation dam in the Hudson River near Troy, New York. The flash boards on the dam raised the level of the pool upstream and materially reduced the head of water and the power developed at respondent's dam three miles up stream from the federal dam. The respondent, Little Falls Fibre Company, brought suit to recover damages and for an injunction restraining petitioner from maintaining flash boards on the crest of the federal dam. The case came to the Supreme Court on a writ of certiorari to review a decision of the Court of Appeals of New York awarding damages and granting the injunction prayed. In affirming the Court of Appeals this Court, after referring to Sections 6, 10, 21, and 27 of the Federal Power Act, said at pp. 378-379:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of

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States and the National Government shall participate jointly in the development and regulation of water power projects. It just as effectively 'saves' state laws 'with respect to bed and banks [of streams] and [with respect] to the appropriation, diversion and use of water for power purposes' [fol. 63] as does Section 27 with respect to laws 'relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses.'" (R. 65)

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those laws or to the extinguishment of rights acquired under them *without remuneration*. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws, and so is one expressly saved by section 27 from destruction or appropriation by licensees *without compensation*, and that it is one which petitioner, by acceptance of the license under the provisions of section 6, must be deemed to have agreed to recognize and protect. Whether section 21, giving to licensees the power of eminent domain, confers on them power to condemn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us." (Italics supplied)

The intervenor, the State of Iowa, contended in the Court below that the Supreme Court in *United States* v. *West Virginia*, 295 U. S. 472, interpreted Section 9(b) to mean that where state laws provide for a state license or permit, the satisfaction of such requirement is a prerequisite to the issuance of a license under the Federal Power Act. In that case the Court, after quoting Section 9(b), said at page 473:

> "The mere grant of the state license, *which the Federal Water Power Act makes prerequisite to the application for the federal license*, cannot be said to involve any infringement of the federal authority. It does not appear that the state has done more." (Italics supplied.)

What was said by way of comment concerning a point not in issue cannot control when that very point is presented for decision. *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *McCormick Machine Co.* v. *Altman*, 169 U. S. 606, 611; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 283-286. Moreover, the wording of the parenthetical statement indicates that it was made without reference to the requirement of the section. Section 9(b) provides for compliance with state laws as a prerequisite to the *issuance* of a license. The re-

quirement is not a prerequisite to an *application for a license* as the comment by the Court in the *West Virginia* case states.

In that case a private corporation obtained a state license and began the construction of a hydroelectric project upon the New River in West Virginia. The United States brought suit against the State of West Virginia and joined the corporation. The suit was to restrain the construction of the project which was nearing completion and to enjoin the State of West Virginia from asserting any right, superior or adverse, to that of the United States in connection with any dam or hydroelectric project on the New or Kanawha Rivers, as well as the production or sale of power from any such project. The State denied that the New River was a navigable water of the United States or that a license under the Federal Power Act was required. The Court found that the State of West Virginia had done no more than to authorize the project. The Court further found that control of navigation by the United States may be threatened by the imminent construction of a dam but not by permission to construct it. The ultimate finding of the Court was that there was no justiciable controversy between the United States and the State of West Virginia, and that the cause was not within the original jurisdiction of the Supreme Court of the United States.

It is thus seen that there was no issue concerning the interpretation of Section 9(b) and that there was no necessity or requirement that the Court pass upon, or interpret, the provisions of that section.

In this connection it should be noted that Section 23(b) of the Federal Water Power Act of 1920 did not then contain provisions making it mandatory that when a dam was to be constructed upon a non-navigable water of the United States, and before construction was begun, that a declaration of intention must be filed with the Federal Power Commission setting forth the details of the proposed project. Section 23(b), as it now stands, includes the amendments

provided by Part II of the Holding Company Act of 1935, Act of August 26, 1935, c. 687, Title II, § 210, 49 Stat. 846. Prior to such amendments, the filing of a declaration of intention to construct such a project was discretionary. Since the amendments of 1935, the filing of a declaration of intention, before beginning construction of a project in waters not defined as waters of the United States, is mandatory. Only when the Federal Power Commission, after investigation, finds that the proposed construction is not in navigable waters of the United States, that the interests of interstate and foreign commerce will not be affected, and that no public lands or reservations will be affected, may a project be constructed "upon compliance with state laws." Section 23(b) is now all inclusive. No power project may be constructed (1) upon navigable waters of the United States without a license from the Federal Power Commission, or (2) upon any other stream not defined as navigable waters of the United States, without filing a declaration of intention with the Federal Power Commission.

The *West Virginia case* differs materially from Petitioner's case because in the former case there had been no determination or finding that the New River, at the point where the project was being built, was a navigable water of the United States, or that the interests of interstate or foreign commerce would thereby be affected. On the other hand, the Federal Power Commission, by its Finding of June 3, 1941, found that the Cedar River in the State of Iowa is a navigable water of the United States, that the interests of interstate and foreign commerce will be affected by the construction proposed, that lands of the United States will be taken and flooded, and finally, that a license from the Federal Power Commission is required. With respect to the questions presented in the *West Virginia case*, the Court, at pages 473-474, said:

> "But there is presented here, as respects the state, no case of an actual or threatened interference with the authority of the United States. At most, the bill states

a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the federal government to control their navigation, and particularly to prevent or control the construction of the Hawks Nest dam, and hence whether a license of the Federal Power Commission is prerequisite to its construction. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See Nashville, Chattanooga & St. Louis R. Co. v. Wallace, 288 U. S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191. Until the right asserted is threatened with invasion by acts of the state, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court. See Fairchild v. Hughes, 258 U. S. 126, 129, 130, 42 S. Ct. 274, 66 L. Ed. 499; State ex rel. Texas v. Interstate Commerce Commission, 258 U. S. 158, 162, 42 S. Ct. 264, 66 L. Ed. 521; Com. of Massachusetts v. Mellon, supra, 262 U. S. 447, 483-485, 43 S. Ct. 597, 67 L. Ed. 1078; State of New Jersey v. Sargent, supra, 269 U. S. 328, 339, 340, 46 S. Ct. 122, 70 L. Ed. 289."

In the cause at bar the State of Iowa does assert jurisdiction over the proposed project and, in the Court below, contended that the project was prohibited by the laws of the State.[31]

The issues presented in the present case are the very issues which this Court said were not involved in the *West Virginia case*. The Court was not there called upon to determine the true import and real meaning of Section 9(b)

[31] See Motion of State of Iowa for Leave to Intervene where the Attorney General of the State says:

"By reason of said provisions of law [c. 363 Iowa Code] and the diversion of water involved in the proposed project of petitioner, the executive council of the State of Iowa could not lawfully grant a permit for the erection of the dam proposed." (R. 49)

of the Federal Power Act, or whether a state law had valid application when that law, as is contended by the State of Iowa, would in effect prohibit and prevent the construction within the state of a federal project under federal license until the state put its stamp of approval upon the project by the issuance of a state permit. To give to Section 9(b) the meaning indicated by the *dicta* in the *West Virginia* case would give to every state and territory full right and opportunity to prescribe the rule and specify the conditions controlling the construction of power projects upon navigable waters of the United States within the borders of such states or territories, and would likewise provide equal control over projects on other streams similarly situated which affect interstate or foreign commerce, and for which a license under the Federal Power Act is required under the provisions of Section 23(b).

Thus, the states and territories, instead of the Federal government, would have jurisdiction and control over power projects on navigable streams of the United States, power projects affecting the interests of interstate or foreign commerce, and power projects involving the use or taking of public lands of the United States. The states and territories could thus lay down the rules under which such projects might proceed. If Section 9(b) is to be given the construction for which the State of Iowa contends; the only limitation upon the State to impose other restrictive legislation is the limitation imposed by inclination. All other states and territories are in like position.

Petitioner respectfully submits that Section 9(b) is not open to a construction which would destroy the manifest purpose of the Act of which the Section is a part. The clear intent of the Federal Power Act is to the contrary. The purpose of Congress, as indicated by the Act itself and the legislative history of the regulation provided, indicates a determined intent to preserve and exercise full continuing control of navigable waters and improvements therein.

IV.

Petitioner is Under No Obligation to Comply With Section 7796 of Chapter 363 of the Iowa Code.

The Court below said:

> "Nothing appears in the record to excuse petitioner's failure to comply with Section 7796. For this reason alone, therefore, the Commission's order must stand." (R. 68)

Such a conclusion is completely illogical unless petitioner is required to make application to the State for a permit to construct the project proposed.

Section 7796 of Chapter 363 of the Iowa Code provides:

> "Whenever the erection of *any such dam* will affect highways or State-owned lands, the *applicant* shall as a *condition precedent* secure a permit from the Board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands." (Italics supplied.)

This section plainly states that an applicant for a permit from the Executive Council of the State, (under Section 7767 and Section 7771) must, as a condition precedent, secure a permit from the state highway commission where highways are to be affected by the construction of a dam. The section is an integral part of Chapter 363 of the Code. In and of itself it has no standing. The Court below was clearly in error.

V.

The Court Below Erred in Holding That "The Commission, Properly, Insisted Upon a Good Faith Effort, by Its Applicant, to Comply with the State Law."

It is to be noted that the Court below, in making its ultimate and concluding determination that "The Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law" (R. 72), did not say that a

state permit was required. The Court implies that the Commission must be satisfied, if Petitioner makes a "good faith effort * * * to comply with the State law."

On the other hand, the Court below, in the course of its opinion, makes the following statement:

> "In recognizing and safeguarding the concurrent interest of the states in hydroelectric developments, it was not the purpose of Congress to require their consent to the construction and operation of such projects, or to give, to the states, a veto power over them." (R. 66)
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Taking the two statements together, the Court seems to say that a State permit is required to comply with Section 9(b) if such a permit can be had; that in any event Petitioner is required to make a *good faith effort* to obtain a permit from the Executive Council of the State of Iowa as required by Chapter 363 of the Iowa Code; and that, if Petitioner fails, notwithstanding its *good faith effort* to obtain the required State permit, then Petitioner may be excused from compliance with the State law, if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The situation is further confused by other statements by the Court, relating to Chapter 363 of the Iowa Code and Section 9(b) of the Federal Power Act, which avoid the real issues of the case and seek to justify that avoidance. Typical of such statements are the following:

> "Petitioner's contention—upon the ground of unconstitutionality—depends also upon the assumption that the disputed Iowa Code Sections constitute an absolute bar to its project, hence that their effect is to defeat the jurisdiction of the Federal government and the purposes of the Power Act. This contention must be rejected, also. It is the duty of courts to avoid the issue of constitutionality if the statute which is being interpreted is susceptible of any reasonable interpretation consistent with constitutionality." (R. 58)
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> "* * * In any event, as the Power Act places upon petitioner the affirmative duty of showing compliance with state laws, it must assume their constitutionality, make its application for a permit and pursue such remedies as may be available in the state, to establish its right to issuance of the permit. Until it has done so, it is in no position to challenge an order of the Commission, which is based upon its failure to do so." (R. 50)

Petitioner is not seeking a construction of any State law. Petitioner is seeking a construction of Section 9(b), and related sections of the Federal Power Act. Questions presented are questions arising under the laws of the United States. Petitioner has a right to have these questions answered by a Federal court having jurisdiction and it should not be called upon to make a "good faith effort" to comply with a state law which it has challenged as not being a state law of the character and purport contemplated by Section 9(b) of the Federal Power Act.[32] The question is: What does Section 9(b) mean? The Court was required to consider state laws only in so far as they were necessarily and incidentally involved, in the construction and interpretation of an Act of Congress.

In *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, the Supreme Court of the United States held that a Federal question was presented when a Federal statute made compliance with a State law the measure of compliance with an Act of Congress. In the course of its decision, the Court said at pp. 217-218:

> "By the passage of the river and harbor bill, * * * * Congress had acted upon the subject, and has provided for the removal of any obstruction to a navigable river

[32] Petitioner's failure to apply for a permit under Chapter 363 of the Iowa Code is not a failure to exhaust an administrative remedy. Petitioner has pursued the administrative procedure prescribed by the Federal Power Act and the rules thereunder. The appeal to the Court below was strictly in accord with the procedure prescribed by Section 313(b) of the Federal Power Act.

with the exceptions named in the section. When the Attorney General, therefore, acts under the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction, and it is its duty, to decide the question whether the existing obstruction is or is not affirmatively authorized by law. In such inquiry the court is bound to decide whether the boom as existing is authorized by any law of the state, when such law is claimed to be a justification for its creation or continuance. That question is not for the state alone, but must necessarily be decided by the Federal court in the course of exercising the jurisdiction conferred upon it by the Federal statute. We therefore cannot concur with the views of the circuit court of appeals upon this subject.

* * * * *

"If there were here no Federal law in existence, then the question whether the boom was authorized by a state law, or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law, the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. If it is authorized by the state law, then the Federal law provides that it may continue; and whether it is or is not, becomes a question for the Federal court to decide."

Likewise, in the case at bar, compliance with certain state laws is made the measure of compliance with Section 9(b) of the Federal Power Act. Is Chapter 363 of the Iowa Code such a state law? The meaning of Section 9(b) is a Federal question. A Federal court, called upon to consider and determine that question may not avoid its obligation because incidentally it is called upon to consider, and possibly interpret, a state law subsidiary to the primary and dominant question before it. The Court below erred in not

definitely determining and stating the true meaning (1) of Section 9(b) of the Federal Power Act, and (2) whether Petitioner was under obligation to secure a permit from the Executive Council of the State of Iowa in order to comply with Section 9(b) and as a prerequisite to the issuance of a license by the Federal Power Commission.

That question remains unanswered. It is presented to this Court for decision.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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February 6, 1946.

APPENDIX.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners

Claude L. Draper, Acting Chairman, John W. Scott and Clyde L. Seavey. Basil Manly and Leland Olds not participating.

June 3, 1941

Docket No. DI-154.

IN THE MATTER OF
FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE.

FINDING OF COMMISSION.

Upon declaration of intention filed January 29, 1940, pursuant to Section 23(b) of the Federal Power Act, by First Iowa Hydro-Electric Co-operative of Muscatine, Iowa, to construct a project on Cedar River, a tributary of the Iowa River, in Muscatine and Cedar Counties, Iowa; and

Upon supplemental declaration of Intention filed April 2, 1941, by the same cooperative to construct a different scheme of development at approximately the same site; and

It appearing to the Commission, after investigation of the proposed construction, consideration of the declaration of intention and supplement thereto, and all pertinent records, that:

(A) The declarant is a corporation organized and operating under the laws of the State of Iowa;

(B) The project as proposed both in the declaration of intention and supplement thereto will be located on the Cedar River near Moscow, Iowa, about 24 miles above its junction with the Iowa River, which latter stream flows into the Mississippi River at a point about 28 miles below the mouth of the Cedar River;

(C) Both the Cedar and Iowa Rivers at one time carried a portion of the produce and immigration of [illegible] Iowa, and steamboats made many trips with [illegible] regularity in this trade;

(D) Past actual use of the Cedar and Iowa Rivers for navigation over a period of years and in substantial volume establishes the susceptibility of these Rivers to navigation, notwithstanding present non-use;

(E) The project as proposed in the original declaration of intention was to consist of a dam on the Cedar River not more than 53 feet high, having an overall length of about 8,555 feet, composed of a non-overflow concrete gravity section, a concrete spillway section controlled by 16 Taintor gates, and an earth section; a power house integral with the dam, with proposed installation of three 5,000 kw. generating units, and a reservoir having a useful storage capacity of 72,000 acre-feet;

(F) The effect of operation of the project, as proposed in the original declaration of intention, would be to reduce the stage of the Iowa River at Wapello, a point about 34 miles below the project, by as much as 1 foot; and to reduce the stage of the Mississippi River at the mouth of the Iowa by 0.5 feet;

(G) The project as proposed in the declaration of intention as supplemented, will consist of the dam on the Cedar River; a diversion canal about 8 miles long from the reservoir on the Cedar River which will divert the water to the banks of the Mississippi River at Muscatine, Iowa; and instead of the power plant being constructed at the dam, it will be constructed on the west bank of the Mississippi River at Muscatine, and will have an initial installation of 50,000 kilowatts, with an ultimate installation of 100,000 kilowatts;

(H) The effect of operation of the project, as described in the declaration of intention as supplemented, on the flow of the Cedar and Iowa Rivers would be substantially the same as that which the original project would have caused, except that it would be more continuous and frequent;

(1) Apparently the diversion canal will be sufficient size to divert the entire flow of the Cedar River over long periods of low and moderate flow; and such diversion could lower the stage of the Iowa River by about 1.6 feet at Wapello, Iowa;

(2) The operation of the [illegible] would cause a discharge [illegible] river-diversion canal into the Iowa River [illegible] in the amount [illegible] for short periods; and [illegible] minimum flow in the Mississippi [illegible] approximately 7,000 c.f.s.

(3) Locks and [illegible] could be so operated as to give a substantial [illegible] for six continuous days and [illegible] a 24-hour period over Sundays [illegible] shut-down periods [illegible] about 12 miles from the [illegible] will be [illegible] ated;

(4) According to the records [illegible] two small islands [illegible] about [illegible] mile and [illegible] proposed project [illegible] Sec. 8, T. 78 N., R. 2 W., 5th Principal meridian, Iowa [illegible] Site Classification No. [illegible]

The Commission *finds* that:

(1) The Cedar and Iowa Rivers [illegible] of the United States;

(2) The diversion of water [illegible] to and use of the diversion canal [illegible] have a direct and substantial effect upon the flow and navigable capacity of the Iowa River [illegible] navigable capacity of that river;

The alternate withholding of water [illegible] and canal during periods of shut-down of the power plant and the release of water at substantial rates of

flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) The interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) The two small islands described in paragraph (d) above are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) A license for the construction proposed above is required under the provisions of the Federal Power Act.

By the Commission.

LEON M. FUQUAY,
Secretary.

PERTINENT SECTIONS OF THE FEDERAL POWER ACT.

SEC. 4. [*As amended August 26, 1935.*] The Commission is hereby authorized and empowered—

* * * * * * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of im-

proving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * * * * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the Commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(e) Such additional information as the commission may require.

. . . . . .

SEC. 23(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under, and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

. . . . . .

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

CHAPTER 363. IOWA CODE, 1939.

Mill Dams and Races.

7767 PROHIBITION—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same. (R60, §1264; C73, §1188; C97, §1921; C24, 27, 31, 35, §7767.)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation, or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council (R60, §1265; C73, §§188, 1189; C97, §1921; C24, 27, 31, 35, §7768).

7769 Notice of Hearing. When any application for a permit to construct, maintain, or operate a dam from and after the passage of this chapter is received, the executive council shall fix a time for hearing, and it shall give notice of the time and place of such hearing by publication once each week for two successive weeks in at least one newspaper in each county in which riparian lands will be affected by the dam (R60, §§1266, 1270; C73, §1190; C97, §1922; C24, 27, 31, 35, §7769).

7770 Hearing. At the time fixed or such hearing or at any adjournment thereof, the council shall take evidence offered by the applicant and any other person either in support of or in opposition to the proposed construction. (R60, §§1267, 1268; C73, §§1192, 1193; C97, §§1924, 1925; C24, 27, 31, 35, §7770.)

7771 When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, §1269; C73, §§1193, 1198; C97, §1930; C24, 27, 31, 35, §7771.)

7772 Certificate of Approval. No permit shall be granted for the construction or operation of a dam where the

water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, §7772.)

7773 Application For Certificate. When it is proposed to use the water for manufacturing purposes, except to develop power, or for condensation purposes, application must be made to the department of health, accompanied by a description of the proposed use of the water and what, if any, substances are to be deposited in such water and chemical changes made in the same, and such other information as the department of health may require to enable it to determine the advisability of the issuance of such certificate. (C24, 27, 31, 35, §7773.)

7774 Granting or Refusing. If the department of health is satisfied that the use of the water in any such project will not cause pollution of the same or render it materially unwholesome or impure, or deleterious to fish life, it may issue a certificate, and if it is not so satisfied, it shall refuse to issue same. (C24, 27, 31, 35, §7774.)

7775 Permit Fee—annual license. Every person, firm, or corporation, excepting a municipality, to whom a permit is granted to construct or to maintain and operate a dam already constructed in or across any stream for the purpose herein specified, shall pay to the executive council a permit fee of one hundred dollars and shall pay an annual inspection and license fee, to be fixed by the executive council, on or before the first day of January, 1925, and annually thereafter, but in no case shall the annual inspection and license fee be less than twenty-five dollars. All fees shall be paid into the general fund of the state treasury.

The provisions of this section shall not apply to dams already constructed having less than twenty-five horsepower capacity. (C24, 27, 31, 35, §7775.)

7776 Construction and Operation. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, §7776.)

7777 Access to Works. Such council or any member, agent, or employee thereof shall at all times be accorded full access to all parts of any dam and its appurtenances being constructed, operated, or maintained in such waters. (C24, 27, 31, 35, §7777.)

7778 Duty to Enforce Statutes. It shall be the duty of the council to require that all existing statutes of the state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C24, 27, 31, 35, §7778.)

7779 Violations. The construction, maintenance, or operation of a dam for the purpose specified herein without a permit first being issued, as in this chapter provided, shall constitute a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. (C24, 27, 31, 35, §7779.)

7780 Action to Collect Fees. If any dam is constructed, operated, or maintained without the provisions of this chapter having been first complied with, including the payment of the permit fee and the annual inspection and license fee, the permit fee and the inspection and license fee may be recovered in an action brought in the name of the state, and in addition to the recovery of the amount due, there shall be collected a penalty of one thousand dollars. (C24, 27, 31, 35, §7780.)

7781 UNLAWFUL COMBINATION—RECEIVERSHIP. If any dam for which a permit has been issued becomes owned, leased, trusteed, possessed, or controlled in such manner as to be controlled by any unlawful combination or trust, or forms the subject or part of the subject of any contract or agreement to limit the output of any hydraulic or hydro-electric power derived therefrom for the purpose of price fixing as to such output, the state may take possession thereof by receivership proceedings instituted by the council, and such proceedings shall be conducted for the purpose of disposing of said property for lawful use and the proceeds shall be turned over to the persons found by the court to be entitled thereto, after the payment of all expenses of the receivership. (C24, 27, 31, 35, §7781.)

7782. NUISANCE. If any dam is constructed, maintained or operated for any of the purposes specified herein, in waters of this state in violation of any of the provisions of this chapter or in violation of any provisions of the law, the state may, in addition to the remedies herein prescribed, have such dam abated as a nuisance. (C24, 27, 31, 35, §7782.)

7783 CONDEMNATION—PETITION. Any person, firm, corporation, or municipality owning land on one or both sides of a watercourse, desiring to construct or heighten any dam in such watercourse or to construct or enlarge a raceway, canal, or other construction necessary for the development or utilization of the water or water power for any of the purposes specified in this chapter therefrom for the purpose of propelling any mill or machinery or developing any power by the use of the water, and to whom a permit has been granted as in this chapter provided, may file in the office of the clerk of the district court of the county in which such dam is, or is to be erected or heightened, a petition designating himself as plaintiff and the owners of the land affected, or that will be affected, as defendants, and describing with reasonable certainty the locality where such dam is to be erected or improved, and also of the lands that will

be overflowed or otherwise affected thereby. (R60, §§1264, 1265, 1274; C73, §§1188, 1189; C97, §1921; C24, 27, 31, §7783.)

7784 PRECEPT FOR JURY—SERVICE. The clerk shall thereupon issue an order, with a copy of the petition attached, directed to the sheriff, commanding him to summon a jury of twelve disinterested electors of his county to meet on a day fixed therein, and upon the land described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. Where the owner of any land affected is a nonresident of the state, service shall be made of the notice by publication in a newspaper in the county once each week for three successive weeks. (R60, §1266; C73, §1190; C97, §1922; C24, 27, 31, 35, §7784.)

7785 GUARDIAN APPOINTED. When service is made upon a minor or insane person having no guardian, the clerk at the time of issuing the order shall, by indorsement made thereon, appoint a suitable person to make defense for him. (C73, §1190; C97, §1922; C24, 27, 31, 35, §7785.)

7786 LANDS IN DIFFERENT COUNTIES. If any of the lands are situated in a different county than that in which the petition is required to be filed, the proceedings shall apply thereto to the same extent as if such lands were situated in the county where it is filed. (R60, §1270; C73, §1191; C97, §1923; C24, 27, 31, 35, §7786.)

7787 OATH—ASSESSMENT OF DAMAGES—COSTS. The jury shall be sworn, impartially and to the best of their skill and judgment, to view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or raceway or heightening or enlarging the same. They may, in addition to examining the premises, examine witnesses, and shall

determine the amount of damages to which each of the defendants are, in their judgment, entitled, by reason of the construction or improvement of the dam or raceway, and shall report their findings in writing, attaching the same to the order and returning it to the sheriff. All costs and fees in connection with the assessment of damages under this chapter shall be the same as in condemnation cases and shall be paid by the plaintiff. (R60, §§1267, 1273; C73, §§1192, 1193, 1203; C97, §§1924, 1925, 1935; C24, 27, 31, 35, §7787.)

7788 APPEAL. Either party may appeal from such assessment to the district court within thirty days after the assessment is made and such appeal and all further proceedings in connection with such matter, whether as to an appeal or the payment of damages and costs, and all other matters connected with the proceedings, shall be the same as provided by law for assessment of damages in taking property for works of internal improvement. (C73, §1194; C97, §1926; C24, 27, 31, 35, §7788.)

7789 PROTECTION OF BANKS. Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or raceway, or to wash a channel, so as to turn the water of such stream or raceway, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be materially injured or affected, the owner or occupant of such mill or machinery, if he does not own such banks or the land lying contiguous thereto, may, if necessary, enter thereon and erect and keep in repair such embankments and other works as may be necessary to prevent such water from breaking through or over the banks, or washing a channel as aforesaid; such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay all damages which the owner of the lands may actually sustain by reason thereof. (R60, §§1275, 1276; C73, §1204; C97, §1936; C24, 27, 31, 35, §7789.)

7790 Embankments—Damages. If any person shall injure, destroy, or remove any such embankment or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason thereof. (R60, §1277; C73, §1205; C97, §1937; C24, 27, 31, 35, §7790.)

7791 Right to Utilize Fall. Any person owning and using a water power for the purpose of propelling machinery shall have the right to acquire, maintain, and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill dams. After such right has been acquired, the fall shall be considered part and parcel of said water power or privilege, and the deepening or excavating of the stream, tail, or raceway, as herein contemplated, shall in no way affect any rights relating to such water power acquired by the owner thereof prior to such change. (C73, §1206; C97, §1938; C24, 27, 31, 35, §7791.)

7792 Revocation or Forfeiture of Permit. If the person to whom a permit is issued under the provisions of this chapter does not begin the construction or the improvement of the dam or raceway within one year from the date of the granting of the permit, his permit may be revoked by the executive council, and if any permit holder does not finish and have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause shown the council has extended the time for completion, such permit shall be forfeited. (R60, §1269; C73, §1199; C97, §1931; C24, 27, 31, 35, §7792.)

7793 Legislative Control. No permit granted or rights acquired hereunder shall be perpetual, but they shall be subject to restriction, cancellation, and regulation by legislative action, and subject to all the provisions of this chapter. (C24, 27, 31, 35, §7793.)

7794 PENDING APPLICATIONS. All applications for a permit to construct a dam pending in the district courts of this state at the time of the passage of this chapter shall be heard and determined by the district court of the county in which same is pending under the laws of Iowa at the time of the making of the application to the district court, and where a permit has, prior to the passage of this chapter, been granted by the district court of any county, the applicant shall, in addition to the making of the application in the form provided in section 7768, file a transcript of the proceedings of the district court granting the said permit with said application, and thereupon a permit shall be issued to the applicant without further proceedings, upon payment of the required fees. (C24, 27, 31, 35, §7794.)

7795 PERMITS FOR EXISTING DAMS. The owner of a dam existing at the time of the taking effect of this chapter shall make application for a permit, which application shall be accompanied by such proofs and data as may be required by the executive council. Upon receipt of such application with proofs and data and payment of fees as required, the executive council shall grant a permit for the maintenance and operation of said dam as a matter of course. The owner of such dam shall, however, be subject to all of the regulatory provisions of this chapter. (C24, 27, 31, 35, §7795.)

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C. 24, 27, 31, 35, §7796.)

7796.1 CITIES AND TOWNS. Cities and towns shall have the authority and power, by complying with the provisions of this chapter and the statutes relating to municipalities to construct dams for recreational purposes and to acquire lands that may be necessary in the construction thereof, which may be obtained by condemnation or otherwise. (C27, 31, 35, §7796-b1.)

EXCERPTS FROM MASTER'S THESIS OF ROY BAKER SNAPP SUBMITTED TO GEORGETOWN UNIVERSITY.

b. *Water Power Legislation 1917-1920*

In 1917 a bill, S. 1419, providing comprehensive legislation for the development of water power on the *navigable streams* of the United States was introduced in the Senate. This bill was the genesis of the Federal Water Power Act. The only provision in S. 1419 similar to Section 9(b) of the Federal Water Power Act was one which provided:

> "* * * * * before the permit shall be granted under this act, the permittee must first obtain, in such manner as may be required by the laws of the States, the consent of the State or States in which the dam or other structure for the development of water power is proposed to be constructed."

The above provision, calling for "consent" of a State to erect a project, is a marked contrast to the ultimate wording of Section 9(b). S. 1419 was passed by the Senate and was referred in the House to the Committee on Interstate and Foreign Commerce which had jurisdiction over navigable streams. Before the House committee could act on the proposed measure, however, President Wilson's intervention resulted in the House striking out everything but the enacting clause of S. 1419 and substituting an entirely new bill.

According to Representative Sims,[17] President Wilson early in 1918 requested the members of the House Committees on Public Lands, Agriculture, Interstate and Foreign Commerce, and Rules to confer with him at the White House. At that meeting the President stated that he had requested the Secretary of War whose department had jurisdiction over navigable rivers, the Secretary of the Interior whose department had jurisdiction over public lands, and the Secretary of Agriculture whose department

[17] Cong. Rec., 65th Cong., 2nd Sess., pp. 9797-99.

had jurisdiction over forest preserves, to prepare a *single bill*[18] *which would be comprehensive enough to cover water power on all sites over which the federal government had jurisdiction.* After summarizing the fundamental principles of the bill, the President asked the members of the committees present if they would object to having a "special committee created composed of an equal number of members of those legislative committees to consider the bill * * * and he asked the Committee on Rules * * * to advise whether or not a rule could be secured or could be formulated that would accomplish this purpose." In reply, Representative Sims indicated that his committee might be reluctant to amalgamate its power over navigable rivers with other committees and Mr. Pou of the Rules Committee said that such a committee could be established, but that the House might be reluctant to do so because such a proposition was new and might be considered as establishing a precedent.

The request of the president, was acceded to by the House, however, and on January 16, 1918, a "Special Committee on Water Power" was appointed.[19] The committee held hearings on the proposed legislation from March 18 to May 15, 1918, obtaining testimony and exhibits totaling almost 900 pages.—[20]

In theory the Special Committee on Water Power conducted hearings on S. 1419. In reality hearings were held on President Wilson's proposed substitute for that bill—

[18] Introduced as H. R. 8716, 65th Cong., 2nd Sess.

[19] Thetus W. Sims, Tenn., Chr. — Carl Hayden, Ariz.
Scott Ferris, Okla. — John J. Esch, Wis.
Asbury F. Lever, S. C. — Irvine L. Lenroot, Wis.
Frank E. Doremus, Mich. — Gilbert N. Haugen, Iowa
Edward T. Taylor, Colo. — Edward L. Hamilton, Mich.
Gordon Lee, Ga. — Wm. L. LaFollette, Wash.
Dan V. Stephens, Nebr. — James C. McLaughlin, Mich.
John E. Raker, Calif. — Richard Wayne Parker, N. J.
Ezekiel S. Candler, Miss. — Sidney Anderson, Minn.

[20] Hearings Before the Committee on Water-Power, House of Rep., 65th Congress, 2nd Sess., 1918.

H. R. 8716. The proposed substitute contained a Section 9(b) which provided that an applicant for a license should submit to the proposed commission:

> "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license under this Act."

With the exception of one slight modification regarding the bed and banks of streams inserted by Representative LaFollette, this Section was ultimately to become also Section 9(b) of the Federal Water Power Act.

The first witness called before the special committee was Mr. Merill[21] of the Department of Agriculture who, as the Chairman indicated, "assisted in the preparation of the bill."[22] After an introductory statement emphasizing the national necessity of water power legislation,[23] Mr. Merill read and explained each section of the proposed substitute for S. 1419. His statement regarding Section 9(b) of the substitute bill was:

> "Section 9 of the bill * * * provides that (an applicant) shall present satisfactory evidence of compliance with the requirements of the laws of the State or States within which the proposed project is to be located, showing that the applicant has made application for such rights as the State required him to get before he can do business. That would cover applications for water rights, for example."[24]

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[21] Subsequently, the first Executive Secretary of the Federal Power Commission.

[22] Hearings Before the Committee on Water Power, House of Rep., 65th Cong. 2d Sess. 1918, p. 8.

[23] *Ibid.*, p. 20.

[24] *Ibid.*, p. 62.

Not a member of the Committee questioned Mr. Merill about the meaning of this section.

The first real illumination shed on Section 9(b) during the testimony before the House Committee was when a Mr. Houghton of New York proposed the section should read as follows:

> "Satisfactory evidence that the applicant has obtained the consent of the duly constituted authorities of the State or States within which the proposed project is to be located and has complied with the requirements of such State or States with respect to application for the right to appropriate, divert, and use water for power purposes, and for the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act." [25]

In the subsequent conversation between Representative Raker (one of the more zealous advocates of irrigation rights in the House) and Mr. Houghton, Representative Raker summarizes so succinctly the general attitude expressed by members of the Special Committee throughout the hearing and during the debate in the House, that the discourse is quoted at length.[26]

> "Mr. RAKER. Referring to your suggested amendments * * *, they would practically change the real fundamental principles of this bill, would they not?
>
> "Mr. HOUGHTON. I think not. What I was trying to have inserted here was this, that before a person applies he has to show the Federal Power Commission that he has complied with the laws of the State and has received proper authority from the proper officials, and in that sense it has changed the bill, because you say that each applicant shall submit, and I say that before he makes application he shall have obtained the consent of the duly constituted authorities of the State or States.

[25] *Ibid.*, p. 364

[26] *Ibid.*, pp. 368-370.

"Mr. RAKER. Fundamentally, it resolves itself into this, that the States might pass laws subsequent to the enactment of this legislation, and if this bill provided or required that the applicants should comply with the State laws, or rules and regulations provided thereunder, before he could operate under this bill, the whole scheme would be subject to the regulation and control, in effect, of the State, would it not?

"Mr. HOUGHTON. I think after he got his power he would be subject, because it provides in here—

"Mr. RAKER. (interposing). But you make this a fundamental prerequisite, that he must have complied with all the rules and regulations in regard to doing the same thing; formulated by the State authorities before he can even come to the Federal commission and become an operator or a licensee under the provisions of this bill.

"Mr. HOUGHTON. I do not think it is quite that, Mr. Raker, because you provide here in Section 9 that each applicant shall submit to the commission certain things. It virtually follows, that until he does do that the Federal Power Commission will not issue him a permit. I want to make sure that the permit will not be issued until he has complied with the requirements in the various States as they may exist at the time he makes his application.

"Mr. RAKER. That really gets back to the fact that before he can proceed to obtain the benefits of this bill, which relates to the property of the Government, he must have complied with any and all laws, rules, and regulations provided by the State through its commission and other public functionaries, and therefore before the Government of the United States can grant him a license or a commission representing the Government of the United States, he must deal with another party first.

"Mr. HOUGHTON. You said public property of the Federal Government. I have confined my remarks entirely to New York State. There are no public lands in New York State, and the only right the Federal Government has, if any, is under the commerce clause as to navigation.

"Mr. RAKER. That is quite considerable under this bill.

"Mr. HOUGHTON. It certainly is, and under the decisions it is very broad. What Congress considers as necessary for navigation is final; there is no review. Here you are seeking in the State of New York to take what the Federal Constitution grants to the citizens of New York; that is, the right to possess their own property for their purposes. It should not be taken from them without just compensation. But here you provide that anybody can go in if the Federal Government thinks it is necessary to regulate or improve navigation and take what belongs to the people of the State. The provisions of this bill might very properly apply to developments in those States where the Federal Government has a large amount of public lands, where a great many of the navigable streams are on the public lands.

"Mr. RAKER. Then, would you not by such legislation be authorizing the Government, whenever these rights in the navigable streams give water power to the States, and allow it to legislate on that subject—would you not really make its legislation subordinate to what the State might determine, not only upon navigable streams but particularly on the nonnavigable streams and on public lands.

"Mr. HOUGHTON. It might work out that way possibly, but it seems to me there should be some protection to the State and its interest because you say navigable and nonnavigable streams. There is no telling when navigable streams will be affected by storage impounding of water on nonnavigable streams, and Congress has absolute power to regulate that.

"Mr. RAKER. That is what I am trying to get at. Congress having that power, should it waive it and make it possible by legislation that before any of this can be done, or before the licensee can get his license or the commission have the power to issue it, he must have complied with any and all regulations provided by the State?

"Mr. HOUGHTON. My suggestions were made with the view of possibly avoiding friction between the two Governments.

"Mr. RAKER. Had we not better hold to what we have and not try to waive a fundamental right that is

so necessary both on the public lands on the non-navigable streams as well as on the navigable streams.'

"Mr. HOUGHTON. I do not agree with you that this suggested amendment waives anything which the bill seems to give to the Federal commission. It simply changes the order of things and it does not add any additional requirements. You say the applicant has to give satisfactory evidence that he has complied with the requirements. I simply say that before he can get the permit he shall show that, so that there will be no question about it. He might get a license and say he had made application to the State government and say he is going to meet their requirements, but he may never go through with it. This is to protect the State. I am trying to save the State.

"Mr. RAKER. You might find this case: A party or association might have complied with all the provisions of the law save the one you referred to in your amendment. The commission would be justified in their view to give him a license, but he cannot comply with the State requirements, and therefore because he is unable to comply with the State regulations, of necessity the commission cannot give him the license, and therefore you would, by your amendment, subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind.

"Mr. HOUGHTON. It says you shall submit satisfactory evidence. That is mandatory. From that point of view, how are you subordinating the powers of the Federal Government, with the bill worded as I have suggested wording it, considering how it is not worded? You say he shall submit satisfactory evidence. That means he has to comply with that condition before he submits his application. I do not see the difference. I am making it stronger to see that he has complied with State laws."

The conversation terminated abruptly here when Representative ESCH interposed a question.

It is evident from the foregoing that in the opinion of Representative Raker compliance with Section 9(b) was

declaratory as to policy, not a condition precedent to the issuance of a license by the proposed power commission. Obviously, Mr. Raker did not believe that the licensing power, provided for by the act, the very heart of the bill, was to be subject to the laws of the forty-eight states.

It is interesting to note, however, that instead of *satisfactory evidence* that the applicant has complied with the laws of the State or States in which the project is to be located, Mr. Houghton proposed that the applicant secure the *consent* of the duly constituted authorities of the State. S. 1419 as it passed the Senate required that "the permittee must first obtain * * * the *consent* of the State or States * * *" (italics supplied). In other words Mr. Houghton was asking the House Committee to return to the wording of the section as it passed the Senate. Not only did the House Committee refuse to do so, but the Senate acceded to the new wording of the Section.

Another witness, Representative Mondell testifying before the committee and in behalf of national water power legislation said:

> "This act should contain—and I suppose there will be no opposition to that on the part of anyone, as a somewhat similar provision was contained in the Ferris House bill; as exactly the same provision is in the reclamation law, and as the principle has been generally accepted and approved—some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.' That is the language, if I recall it rightly, of the reclamation of law, and I think in substance the provision contained in the Ferris bill. That is simply a statement of facts. It is not a new law. It is simply recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things. They get views and theories that lead them far afield. Some people have suggested—I do not know whether that has been suggested before this committee—that the Supreme Court decision in the Utah case—if that is the

> term used in connection with that case—in some way raises the question as to the complete control by the States of the waters within their borders, particularly the arid States. I do not think there is a line or a word or a suggestion in that decision that raises any question of that sort * * *"[27]

Representative Mondell's reference to the Reclamation Act[28] and the Ferris Bill[29] was correct in that both provide "That nothing in this Act shall be construed as affecting or intended to effect or to in any way interfere with the laws of any State * * * relating to the control, appropriation, use, or distribution of water * * *." It must be noted, however, that this proposed language appears in Section 27 of the Federal Water Power Act, not in Section 9(b).[30] It is noteworthy that Representative Mondell indicated that his interpretation of Supreme Court decisions was that the States under the Constitution had complete control of the non-navigable "waters within their borders," and that he referred to his proposal as a "guide to administrative officers" and as a recognition of existing constitutional law.

Outside of these two discussions over Section 9(b) of the substitute bill, none of the other witnesses before the Special Water Power Committee offered any suggestions. The only other suggestions made were minor in nature and were proposed to protect the water rights of the Western States.[31]

The Special Committee did not agree to the proposed alterations in Section 9(b) of the substitute bill and reported the measure without modification in that section.

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[27] *Ibid.*, 620.

[28] 32 Stat. L. 388, Ch. 1093 (June 17, 1902).

[29] H. R. 16673, 63 Cong. 3rd Sess.

[30] Section 27 provides, "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

[31] Note 22, *supra*, p. 299 and p. 474.

After S. 1419 was reported out of the Committee, Representative LaFollette made a short speech [32] in the House praising the proposal and pointing out, in particular, that it did not usurp any of the powers of the various states. Mr. LaFollette explained that.

> "This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. * * * under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue."

In the same speech, Mr. LaFollette also indicated that he thought that the "legislation will prove to be sound in principle and sane in provisions as it comes from the committee, and, what is of transcendent importance, it will, with possibly one or two changes, *stand the test as to constitutionality*" (italics supplied). The "changes" to which Mr. LaFollette referred were his proposal to add "bed and banks" to the list of items with which an applicant for a license would "comply." He believed that.

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue."

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[32] Cong. Rec. Vol. 56, part 9, p. 9108, 65 Cong. 2d Sess.

When debate on the bill began, Representative LaFollette was the first to speak after the Clerk read Section 9(b) of the proposed act. His earlier expression of concern as to the constitutionality of the bill was demonstrated by his proposing to amend Section 9(b) as follows (Mr. LaFollette's proposed addition in italics):[33]

> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the *bed and banks and* to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act."

Mr. LaFollette gave the following reasons for proposing the amendment:[34]

> "Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:
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> 'The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks.'
>
> "In many States the law gives the riparian owner

[33] *Ibid.*, p. 9109.

[34] *Ibid.*, p. 9110.

title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get developments. We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States."

Thus, according to Mr. LaFollette, a member of the Special Committee on Water Power, the *purpose of Section 9(b) was to avoid infringing on the rights of the states and thusly to prevent questions of constitutionality from invalidating the proposed act.* The amendment was acceded to by the House.

The next amendment to Section 9(b), offered by Representative Parker of New Jersey, was to permit an applicant to provide the Commission with satisfactory evidence that he "will comply" with laws of the State, rather than that he "has complied" with such laws.[35] During the debate on the proposed amendment, Representative Mondell said that he undersfood Section 9(b) merely to require "a certain applicant shall do certain things, shall comply with certain regulations and certain laws, and *all applicants can do that*" (italics supplied). This amendment failed.

The only other amendment of importance was offered by Representative Raker of California, who proposed that an applicant should provide satisfactory evidence that he

[35] Cong. Rec., Vol. 56, part 10, p. 9811.

had complied with the requirements of the law of the State or States in which the proposed project was to be located, "with respect to application for the right to appropriate, divert, and use."[36] Representative Raker was concerned because most state laws provide that even after an application for water rights is filed, no right can attach until an actual appropriation has been made. Such actual appropriation must by the nature of things be accompanied by substantial expenditures of funds in any case in which the appropriation is important quantitatively. Mr. Raker thought that the proposed commission might require an applicant to obtain a completed water right and he was afraid that after large expenditures an applicant might find himself refused a permit by the proposed commission.

Representative Mondell who, as noted earlier, testified in behalf of the bill, differed from Representative Rankin as to necessity and propriety of his amendment. During the debate on Representative Raker's amendment, Representative Mondell explained his interpretation of the proposed Section 9(b) as follows (italics supplied):[37]

> "Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was

[36] Cong. Rec., Vol. 56, part 10, p. 9812.
[37] *Ibid.*

under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the commission very great harm would come if the amendment the gentleman proposes should be adopted. *There are two controlling reasons for the insertion of this paragraph. The first,* from the standpoint of water-power legislation, *is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion.* That is a very important reason for a provision of this kind. * * * *The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*"

Mr. Mondell's explanations were consonant with other statements about Section 9(b) made during the debate, i.e., the section was for the guidance of the commission and that it was intended to be a restatement of the existing law on the subject.

S. 1419, as entirely rewritten was passed by the House, 231 to 23. Section 9(b) as passed by the House was accepted by the Senate without alteration or debate.

After some modification in other sections of the bill, the Senate approved the measure and appointed a special committee composed of three members each from the Committee on Commerce and the Committee on Public Lands, to meet with House conferees on the proposed legislation. The conference reported out a compromise which passed the House but which was filibustered to death in the Senate by Senator LaFollette of Wisconsin in order to prevent passage of the pending General Deficiencies bill, which he hoped in turn

would force President Wilson to call a special session in Congress and thus prevent him from attending the Peace Conference in Paris."[38]

At the very next session of Congress, S. 1419 as agreed to by the conferees, was introduced in the House as H. R. 3184, and a new special Committee on Water Power was appointed. Inasmuch as the newly constituted special Committee was practically the same as the old one and in view of the volume of hearings already produced on the subject, the new Committee reported out the bill without further hearings. Section 9(b) was left unaltered in the new bill.

There was no debate on Section 9(b) directly in the new session of Congress. There were two oblique references to the section made in the House, however, which might be noted. In response to a query of Representative Goodykoontz of West Virginia as to whether or not a dam could be erected on the Kanawha River in defiance of the wishes of the people below the site of the proposed dam who might be concerned for their safety in the event of a break in the dam, Representative Sinott quoted Section 9(b).[39] Mr. Sinott also indicated that in his opinion Section 9(b) applied before as well as subsequently to the issuance of a license.[40] There was no mention in the Senate of Section 9(b) of the new bill.

H. R. 3184 was passed by the House and the Senate and became law when the President signed the bill June 10, 1920.

c. *Summary.*

Although the legislative history of the Federal Water Power Act is exasperatingly voluminous, the foregoing references to Section 9(b) are the only ones relating di-

[38] For a description of the occasion and of President Wilson sitting in the Capitol to await the outcome, see New York Times, March 5, 1919.

[39] Cong. Rec., Vol. 58, Part 3, pp. 2225-2226.

[40] *Ibid.*

rectly to that provision. These references, unfortunately, are far too few and were made for the most part without a careful choice of expression. Excerpts from statements made during the hearings and the debate on Section 9(b) can be quoted either in support of the proposition that the section is or *is not* a limitation on the licensing power of the Federal Power Commission. There was a great deal of chattering about "compliance with state laws" in the historical development of the section, without anyone clearly defining what was intended by the phrase.

There is, however, no evidence that Congress intended Section 9(b) to be a limitation on the licensing power of the Federal Power Commission, there is some evidence that Congress did not intend it to be a limitation, there is considerable evidence that Congress did intend it to be a guide for administrative officers, and there is considerable evidence that Congress intended it to be a restatement of existing constitutional law on the subject.

The magnifying glass approach to the legislative history is an unsatisfactory method of determining the ultimate intent of Congress in inserting Section 9(b). True perspective of the position the Section occupies in the Federal Water Power Act is retained, however, if it be remembered that Congress was embarking on an absolutely new and untried field of federal regulation and was consequently eager to prevent the legislative innovation from being declared unconstitutional by the courts. This eagerness was, in part, responsible for the insertion of Section 9(b).

There is, moreover, little doubt that Congress desired to avoid as much conflict as possible between the national and state governments in the administration of the Federal Water Power Act. To this end Section 9(b) appeared a reasonable solution. Though not clearly evident from the wording of the section, the weight of the evidence revealed in the legislative history of Section 9(b) supports the conclusion that when Congress provided that an applicant must submit "satisfactory evidence" of compliance with state

laws, Congress intended for an applicant to comply only with such state laws as did not interfere with the erection of a power project under the supervision of the Federal Power Commission. Congress contemplated that Section 9(b) should be viewed as a legislative declaration of policy, not as a condition precedent to the granting of a license.

In administering the Federal Water Power Act, the Federal Power Commission should, in conformance with Congressional policy, insist that an applicant comply with all the laws of the state or states, within which he proposes to locate a project, which do not thwart the express will of Congress to provide for a comprehensive scheme of navigation and water power development.

Although the legislative history of Section 9(b) supports these conclusions, it is appropriate to investigate the propriety of examining the legislative history of the Section, the interpretation given the Section by the Commission and the courts, and the constitutional questions involved, before arriving at a final conclusion.

PART XI—SUMMARY AND CONCLUSION.

The Federal Water Power Act was passed by Congress in response to a demand for comprehensive water power legislation. Congress intended that, within constitutional limits, the Federal Power Commission should implement the Congressional policy expressed in the Act. Congress also desired that the Commission should administer the Federal Water Power Act with a minimum of conflict with the laws of the various states.

In part to achieve this end, Congress inserted Section 9(b) in the Federal Water Power Act. Section 9(b) should be considered, however, only as a Congressional declaration of policy to harmonize Federal power activities with those of the several states, not as a condition precedent to the granting of a license by the Federal Power Commission. The Commission should, in the interests of comity,

carry out this direction of Congress as long as State laws do not impede the general intent of Congress as expressed in the entire Act.

Congress further desired to point out to the courts that it had no intention of invading the police and tax powers reposing in the States under the Constitution. To this end also, Section 9(b) was inserted in the Federal Water Power Act.

Because of the questions which arise regarding Section 9(b), it is appropriate and necessary to study the legislative history of the Federal Water Power Act to determine the intent of Congress.

Until 1944 the Federal Power Commission administered the Federal Water Power Act in conformance with the policy expressed by Congress. The Commission has compelled applicants for a license to comply with the provisions of the laws of the various States when such compliance was constitutionally necessary. The Commission has, in addition, required compliance with the laws of the various states when such compliance did not impede the general policies expressed in the Federal Water Power Act. On January 29, 1944, however, when a situation was presented whereby compliance with state laws prevented a comprehensive scheme of water power development, the Federal Power Commission ruled that Section 9(b) of the Federal Water Power Act was mandatory, not directory as to policy. The Commission inferentially held that Section 9(b) contemplated an abandonment by the Federal Government of the concurrent and usually exclusive jurisdiction it exercises over the streams of the nation in favor of the States, if state statutes required such an abandonment. This ruling apparently was made without recourse to the legislative history of Section 9(b), without citation of authority, and in complete disregard of the judicial interpretation given since 1920 to the Federal Water Power Act and its various sections.

The courts have repeatedly emphasized the intention of Congress to provide for comprehensive water power devel-

opment by the Federal Water Power Act and have consistently upheld a broad constitutional basis of authority for the Federal Power Commission to carry out the provisions of the Act. The courts have, furthermore, indicated by the interpretation of sections of the Federal Water Power Act similar to Section 9(b) that such provisions recognize rights acquired under state laws, but that such rights may be extinguished by eminent domain proceedings instituted in accordance with the Act.

Considering all the factors enumerated above and elsewhere in this paper, the ultimate conclusion is that Section 9(b) of the Federal Water Power Act requires compliance with the laws of the State or States within which an applicant proposes to locate a project when the Federal Constitution requires such compliance, but that compliance with other state laws is a problem for administrative determination by the Federal Power Commission in the light of policy as expressed by Congress in the Federal Water Power Act.

LEGISLATIVE HISTORY OF FEDERAL POWER ACT, WITH PARTICULAR REFERENCE TO SECTIONS 9(b) and 27*

The bills which led to the enactment of the Federal Water Power Act in 1920 may be divided into the navigable waters bills and the public lands bills.

The navigable waters bills were the Adamson Bill of 1914, H. R. 16053, 63rd Cong., 2nd Sess., the Adamson Bill of 1916, S. 3331, 64th Cong., 1st Sess., and the Shields Bill of 1917, S. 1419, 65th Cong., 2nd Sess., later amended by incorporating the provisions of H. R. 8716, 65th Cong., 2nd Sess., which changed it to the present Federal Water Power Act.

The public lands bills were the Ferris Bill of 1914, H. R. 16673, 63rd Cong., 3rd Sess., and the Ferris Bill of 1916, H. R. 408, 64th Cong., 1st Sess.

The bill which became the Federal Water Power Act was H. R. 3184, 66th Cong., 1st Sess.

Section (9). The provisions of Section 9(b) of the Federal Water Power Act for the submission of evidence with respect to the applicant's compliance with requirements of certain specified kinds of State laws are in striking contrast to the corresponding provisions which first appeared in the antecedent navigable waters bills and which made compliance with State laws in general a condition precedent to the issuance of the Federal permit.

The Adamson Bill of 1914 in Section 14 had a provision to the effect "that the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant *having complied with the laws of the state* in which the dam is constructed or to be constructed by the United States, the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed * * *." 51 Cong. Rec. 12407. [Emphasis supplied.]

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* Taken from Brief of Counsel for the Federal Power Commission as filed with the Court below.

The Adamson Bill of 1916, S. 3331, had a provision in Section 2 regarding compliance with state laws, reading as follows:

> As between contesting applicants for a permit hereunder having the legal qualifications required by this Act, and being equally well qualified to improve or develop waterways for the uses of interstate or foreign commerce, preference shall be given to that applicant which is best qualified to expedite and realize the maximum useful development of all the water resources of the region; and as between such contesting applicants which appear equally well qualified in such respect, then preference shall be given to that applicant which *has first complied with the laws of the State or States* in which the dam or diversion structure is to be constructed. [Emphasis supplied.]

The Shields bill, S. 1419, in its original form, contained provisions similar to that in the Adamson bills as to compliance with State law with the provision added to the effect that in all cases the permittee must first obtain the consent of the State or States in which the dam is to be constructed, reading as follows:

> As between contesting applicants for a permit hereunder having the legal qualifications required by this Act, and being equally well qualified to comply with the conditions imposed herein, preference shall be given to that applicant which *has first acquired the right to divert the water of the stream* by means of the dam to erect which the permit is sought *and otherwise complied with the laws of the State or States* in which the dam or diversion structure is to be constructed; or if there are no State laws to be complied with the preference shall be given to the first applicant. In granting permits hereunder and fixing conditions thereof, and in prescribing rules and regulations as to the maintenance and operation of any structure to which this Act is applicable, the Secretary of War, before acting, shall have the report and advice of the Chief of Engineers: *Provided, however*, That before the permit shall be granted under this Act, the permittee must first

obtain, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed. [Italics supplied.]

The first provision[1] corresponding to Section 9(b) to appear in the antecedent public lands bills was in the second Ferris bill of 1916, H. R. 408, which contained the following provision:

> *Provided*, That no lease shall be granted until the applicant *has complied with the requirements of the laws* of the State, States, or Territory wherein said project is to be located, providing for the appropriation of water to develop or generate the electrical energy intended to be generated by applicant's proposed project. [Italics supplied.]

The first combined navigable waters and public lands bill was H. R. 8716, introduced January 15, 1918, as the House substitute for the original Shields bill, S. 1419, and subsequently adopted in the House as an amendment to S. 1419. Section 9(b) of the House substitute was identical with Section 9(b) of the Federal Water Power Act as subsequently enacted, except that it did not include the words "bed and banks and" which were added by amendment in the House (56 Cong. Rec. 9810, 9811). Section 9(b) in the House substitute, H. R. 8716, marked a distinct departure from the corresponding provisions in the antecedent bills. Not only was all language requiring State "consent" omitted, but the language with respect to compliance with State laws was changed in two respects: first, the State laws referred to were narrowly limited to those "with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in

[1] This provision apparently was an outgrowth of an amendment to Section 1 of the first Ferris bill, H. R. 19673, introduced by the Senate Committee on Public Lands. See Sen. Rep. 898, 63rd Cong., 3rd Sess., pp. 1, 4, 5.

the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." Second, instead of making compliance with State laws a condition precedent to the issuance of the license, the Commission was authorized, in its discretion, if it should consider that the applicant had not submitted "satisfactory evidence" of compliance with State law, to refuse to proceed further administratively with consideration of the application.

The various attempts to amend the language of Section 9(b) as it appeared in the House substitute, H. R. 8716, and the committee reports and debates relating thereto, confirm this understanding of the Congressional purpose.

The first amendment proposed was that recommended by the Secretaries of War, Interior and Agriculture, who, in a letter dated February 17, 1918, to Honorable T. W. Sims, Chairman of the Special House Committee on Water Power, submitted their proposed amendments to H. R. 8716 (House Rep. 715, 65th Cong., 2nd Sess.) to accompany S. 1419, pp. 29-39. The Secretaries proposed to change Section 9(b) so as to require the submission of satisfactory evidence of compliance with State laws with respect to "*application* for the right to appropriate (etc.)," instead of compliance with State laws with respect to "the *appropriation* (etc.)." This proposed amendment was not adopted by the committee and was thereafter offered on the floor of the House by Representative Raker as an amendment to Section 9(b) (56 Cong. Rec. 9812).

> Mr. RAKER. * * * Now, let me call this to the attention of the committee: Here is an application according to the laws of my State and of the other States, where he has complied with the water laws in making his application for a right to use the water. He has absolutely no right, he has nothing in the way of an indefeasible water right, until he has completed the work and placed the water in actual use. Now, when he makes that application this provision in the law to-day is absolutely impossible to be complied with, because

you require him to show that he has built the dam and constructed the ditches and put the water to an actual beneficial use before he is ever in a position to do it, when he had paid out, maybe, a million dollars or two million dollars to construct the dam and build the ditches so that he can turn the water into the head and commence to generate electricity. Now, if the man has complied with the law relating to the application for the water right, for its diversion and appropriation and use, and then gets his permit and proceeds and actually develops it according to that project, the moment he turns the water over the wheel the first time, or turns it upon the land to irrigate it, his right is complete and retroacts back to the time when he gave the notice, and no intervening party can come along and prevent it in the meantime. But to say that he must prove a valid water right at the time of making the application, I tell you it can not be done * * * (56 Cong. Rec. 9813.)

The viewpoint of those who opposed Congressman Raker's amendment and who ultimately prevailed is indicated by the following statements by Congressmen Mondell and Walsh:

Mr. MONDELL. The gentleman's argument is all based on the assumption that this paragraph requires the perfection of a water right. There is nothing in the paragraph that requires the perfection of a water right (56 Cong. Rec. 9813).

Mr. MONDELL. The bill provides that all provisions of the law, whatever they may be, shall have been complied with up to that time (56 Cong. Rec. 9813).

Mr. WALSH. I think if a person has filed his application for the right to appropriate water, and has complied with the laws respecting the filing of applications, it is not necessary that he should actually have appropriated the water in order for him to be said to have complied with the laws respecting the appropriation of water (56 Cong. Rec. 9813).

Mr. MONDELL. Mr. Chairman, I hope the amendment offered by the gentleman from California [Mr. Raker] will not prevail. I think the gentleman must

have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempt to amend requires a completed water right and a water right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the Commission very great harm would come if the amendment the gentleman proposes should be adopted. There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion. That is a very important reason for a provision of this kind. Another reason—(56 Cong. Rec. 9813-9814).

Mr. MONDELL. The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not (56 Cong. Rec. 9814).

As already stated, the additional words "bed and banks and" were added by an amendment in the House offered by Congressman LaFollette, who explained the reason for the amendment as follows:

Mr. La Follette. Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:

"The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks."[2]

In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development (56 Cong. Rec. 9810-9811).

Thus, the limited scope of the state laws referred to in Section 9(b) and the clear purpose of Congress not to require state consent to the hydroelectric developments to be licensed by the Commission, finds corroboration at every stage in the legislative history of the provision.

Section 27. In the case of Section 27, the outstanding fact in its legislative history is its derivation through the public

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[2] The language quoted by Congressman La Follette will be found in *United States* v. *Cress*, 243 U. S. 316, 319.

lands bills from Section 8 of the Reclamation Law of 1902, c. 1093 (32 Stat. 390), U. S. C. Title 43, §383, reading as follows:

> Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such section shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof. (June 17, 1902, ch. 1093, §8, 32 Stat. 390).

This language was reflected in Section 14 of the Ferris Bill of 1914, H. R. 16673, which reads as follows:

> SECTION 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder.

Congressman Mondell's discussion of this provision in the second Ferris Bill makes it even clearer that the provision was based upon the proprietary nature of the interests of the United States and was intended to relate particularly to the public land states of the West in which the law of prior appropriation obtained:

> Mr. MONDELL. Water Rights Under State Control. Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public-land States is a right received from the people of the State and not from the Federal Government. The people of the Commonwealths of the West are the owners and proprietors of all the waters within their borders, and the only right that any individual can

> have or secure at least in the majority of the public-land States, is the right to use the water at a certain designated place for a specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water or to use a drop of water for the turning of any wheel or turbine. That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people through the authorities they have provided in the States. That right in all of the States is perpetual, so long as the water shall be used at that place for that beneficial purpose (51 Cong. Rec. 13630-13631).

A broader version of the provision appeared in the Ferris Bill of 1916, H. R. 408.

> SEC. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.

This provision did not reappear in the first combined navigable waters and public lands bill, H. R. 8716, but reappeared in the narrower original form in the amended Shields Bill, S. 1419, and H. R. 3184, and was enacted as Section 27 of the Federal Water Power Act in substantially the original form. Section 27, as enacted, reads:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water *used in irrigation or for municipal or other uses, or any vested right acquired therein.* [Italics supplied.]

Thus the origin and history of Section 27 confirms what a consideration of its language indicates, that the state laws therein referred to are laws governing property rights, particularly the laws of the public lands states in which the law of prior appropriations obtains.